Gulf Coast Rebar, Inc. *and* Iron Workers Regional District Council, International Union of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL–CIO. Cases 12–CA–149627, 12–CA–149943, 12–CA–150071, 12–CA–151050, and 12–CA–151091

September 18, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On March 4, 2016, Administrative Law Judge Keltner W. Locke issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief. The Respondent filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

The only contested issue remaining in this case is whether Gulf Coast Rebar, Inc. (the Respondent) violated Section 8(a)(5) and (1) of the Act by failing to respond to the March 23, 2015 information request of the Iron Workers Regional District Council (the Charging Party or the Union). The Respondent admitted the necessity and relevance of the information sought, as well as its failure to provide it. However, the Respondent contends that it had effectively repudiated the collective-bargaining agreement—entered into under Section 8(f) of the Act—during its term and that the Union had clear and unequivocal notice of the unlawful repudiation outside of the Section 10(b) period, i.e., more than 6 months before the Union filed unfair labor practice charges in April 2015. Thus, the Respondent claims that it was under no obligation to respond to the Union's information request and, in any event, that the Union's charge challenging the Respondent's failure to provide the information is untimely.

The judge essentially agreed with the Respondent's 10(b) argument and dismissed the Section 8(a)(5) allegation. The General Counsel and the Union have each excepted to the dismissal. For purposes of this decision, we assume, without deciding, that the Respondent is correct that a clear and unequivocal mid-term repudiation of its 8(f) agreement with the Union, even if untimely and unlawful, would have excused its obligation to comply with the Union's subsequent information request. We nevertheless reverse the judge and find that the Respondent failed to demonstrate that the Union had clear and unequivocal notice of any contract repudiation outside of the 10(b) period.[2] Accordingly, the undisputed failure to provide the requested relevant information was unlawful.

I. FACTS

The Respondent is a contractor in the construction industry. On March 13, 2009, the Respondent and the Union entered into a collective-bargaining agreement pursuant to Section 8(f) of the Act (the Agreement). The Agreement was initially set to expire on February 10, 2012, and thereafter would automatically renew on an annual basis until either party sent notice of termination or modification (by certified mail) at least 4 months before the next expiration date. It is undisputed that the Respondent failed to properly terminate the Agreement in accordance with these terms.

Instead, on October 18, 2011, less than 4 months before the contract expiration date, the Respondent's attorney sent a letter to the Union stating, in pertinent part: "We deny the legality of this contract and believe it to be void, nevertheless, this letter is to affirm that which my client has already done and to the extent a court deems it not to be void we immediately terminate it." On Febru-

[1] We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996); *Excel Container, Inc.*, 325 NLRB 17 (1997); and *J. Picini Flooring*, 356 NLRB 11 (2010). Further, in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall include the requisite tax compensation and Social Security reporting remedy, and shall modify the judge's recommended Order and substitute a new Notice to reflect this remedial change and to conform to the violations found and the Board's standard remedial language. Finally, in accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall order the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

For the reasons stated in his separate opinion in *King Soopers*, supra, slip op. at 9–16, dissenting Chairman Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

[2] We further find, as admitted by the Respondent, that it violated Sec. 8(a)(1) by telling employees, on April 13, 2015, that it did not recognize the Union. Although the judge purported not to find this violation, he included the appropriate cease-and-desist remedy for it in his recommended Order.

In the absence of exceptions, we affirm the judge's findings that the Respondent committed several other Sec. 8(a)(1) and (3) violations.

ary 10, 2012, the Union's attorney replied by letter, stating that the Respondent's October 2011 letter was "ineffective to terminate the contract, inasmuch as it fails to comply with the requirements" of the Agreement. The letter further stated that the Union "consider[ed] the collective bargaining agreement to remain in full force and effect." The Respondent did not reply to the Union's letter.

Previously, the Union and the fringe benefit funds had filed a lawsuit in federal district court on May 31, 2011, asserting claims for missed dues and fringe benefit payments under the Labor Management Relations Act (LMRA) and Employee Retirement Income Security Act (ERISA). On April 3, 2012, approximately 6 weeks after receiving the Union's February 2012 reply letter stating that the Agreement remained in effect, the Respondent invoked the Agreement's grievance procedure by moving the district court to compel arbitration of the Union's claims.[3] On October 22, 2012, the district court granted the Respondent's motion to compel arbitration of the LMRA claims. In the subsequent arbitration proceeding, the Respondent argued that the Agreement was void ab initio as a result of fraud, duress, and misrepresentation by the Union. Thereafter, on April 9, 2014, the arbitrator issued an award in favor of the Union, and directed the Respondent "to submit to an audit to determine all dues and assessments owed from the period August 2009 to the present." The district court confirmed and enforced the arbitration award on January 26, 2015.

II. ANALYSIS

The Board has long required "a party, in order to avoid the [Section 10(b)] time-bar,[4] to file an unfair labor practice charge within 6 months of its receipt of clear and unequivocal notice of total contract repudiation." *A & L Underground*, 302 NLRB 467, 468 (1991). "[T]he Board's long-settled rule [is] that the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act." Id. at 469. "[T]he burden of showing that the charging party was on clear and unequivocal notice of the violation rests on the respondent." Id. The time bar does not apply where the charging party's "delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party." Id. Here, the Respondent has not met its high burden of proof.

The Respondent and the judge principally rely on two factors in support of the argument that the Union had clear and unequivocal notice of the Respondent's repudiation of the Agreement more than 6 months prior to the filing of unfair labor practice charges in April 2015: (1) an October 18, 2011 letter from the Respondent's attorney to the Union, and (2) the Respondent's failures to comply with the Agreement's requirement that it make benefit fund payments. We discuss each factor in turn.

The Respondent's reliance on the October 2011 letter is unavailing. Even assuming, without deciding, that the letter could have constituted clear and unequivocal notice to the Union of repudiation, signifying that the 6-month 10(b) period commenced at that time, the Respondent acted inconsistently with any such repudiation within that 6-month period. In April 2012, the Respondent moved a federal district court to compel the Union to arbitrate, in accordance with the Agreement's arbitration provision, its legal claims for missed payments. By invoking arbitration under the very contract it claimed to have repudiated months earlier, the Respondent at the very least sent the Union a "conflicting signal" concerning its position on the Agreement's continuing validity. See *A & L Underground*, 302 NLRB at 469.[5]

Our dissenting colleague claims that for a "conflicting signal" to be a valid explanation for a "delay in filing" an unfair labor practice charge, it must "predate[] the express repudiation." Here, he suggests that the Board should not consider the Respondent's invocation of the Agreement in moving to compel arbitration as a conflicting signal because it occurred after the October 2011 letter that allegedly constituted a clear repudiation of the Agreement. This argument mischaracterizes Board precedent such that it would turn Section 10(b) on its head. In *A & L Underground*, the Board made the following observation: "The only parties against whom the [time] bar might be a hardship—those whose delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party—are not barred by our holding." Id. The "delay in filing" to which the Board

[3] We grant the General Counsel's request that the Board take administrative notice that the Respondent filed its motion to compel arbitration in federal district court on April 3, 2012.

[4] Sec. 10(b) of the Act provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board…."

[5] We reject the judge's alternative conclusion that, if the October 2011 letter was not dispositive, the Respondent clearly and unequivocally repudiated the Agreement on January 7, 2014, by arguing to the arbitrator that the contract was void ab initio. Contrary to the judge, we do not find that the Respondent's "strong accusations" that the Union procured the Agreement "by fraud, duress, and misrepresentation" somehow placed the Union on notice that the Respondent was unlawfully repudiating the Agreement at that time, in advance of and regardless of the outcome of the contractual arbitration process. Rather, the Respondent's argument before the arbitrator that the Agreement was void strongly implied that the Respondent would not persist in denying the contract's legality in the event of an adverse legal ruling on that issue.

referred necessarily encompasses the entire 6-month 10(b) period during which a timely charge may be filed, not merely the putative moment of repudiation. In this case, the letter on which our colleague relies is dated October 18, 2011, and the Respondent filed its motion to compel arbitration on April 3, 2012, within 6 months of the letter. Even assuming that the October 2011 letter constituted the Respondent's clear repudiation of the contract, the Union would have had until April 18, 2012, to decide whether to file a charge. The Union's decision necessarily would be informed by the Respondent's conflicting signal, i.e., the motion to compel. Our colleague's crabbed reading of precedent would effectively discount any ambiguous conduct by a repudiating party occurring after an alleged repudiation event even though the nonrepudiating party is statutorily entitled to the full 6 months to decide whether to file, and to actually file, a charge. Further, nothing in *A & L Underground* suggests that a nonrepudiating party must immediately decide whether to file a charge and to ignore all subsequent ambiguous conduct in which the repudiating party engages. We accordingly reject our dissenting colleague's attempt to effectively shorten the statutory filing period for unfair labor practice charges in the contract repudiation context.[6]

We likewise find that the Respondent's failure to remit various payments to the Union and affiliated fringe benefit funds in accordance with the Agreement did not evince a clear and unequivocal repudiation of the Agreement.[7] In contending that this conduct effected a clear repudiation, the judge and the Respondent rely principally on *Park Inn Home for Adults*, 293 NLRB 1082, 1083 (1989) (respondent's failure to make benefit payments for about 2 years before contract's expiration gave union "clear notice of [respondent's] repudiation of any obligation to contribute to the funds outside the 10(b) period"). However, the *Park Inn* line of cases is distinguishable inasmuch as the Board there and in like cases found a repudiation of a particular contract obligation, such as the obligation to contribute to benefit funds, rather than a repudiation of an entire contract. See, e.g., *Farmingdale Iron Works*, 249 NLRB at 98–99 (union had notice of unlawful failure to remit benefit fund contributions outside of 10(b) period, but did not have unequivocal notice of intent to repudiate the contract as a whole). Here, the failure to make the payments in question, at most, provided the Union with notice of the Respondent's intent to repudiate those contract provisions, and not the Agreement as a whole. Finally, as previously stated, *the Respondent* invoked the Agreement's terms when moving a federal district court to compel arbitration of the Union's legal claims for missed payments. Even assuming, based on the Respondent's missed payments, that the Union did receive clear notice of repudiation of any relevant contractual benefit provisions, the Respondent's motion to compel arbitration operated as a "conflicting signal" suggesting to the Union that the Respondent had not repudiated the contract as a whole. See *A & L Underground*, 302 NLRB at 469.

In sum, the Respondent never gave the Union clear and unambiguous notice outside the Section 10(b) period that it was repudiating the entire contract. Consequently, the Agreement and the corresponding bargaining relationship between the Respondent and the Union continued, and the information request predicated on that relationship remained valid.

[6] Our dissenting colleague objects to our treatment of the Respondent's motion to compel arbitration as a "conflicting signal" because, in his view, doing so is inconsistent with a federal labor policy favoring arbitration, and "discourages parties from seeking an arbitral forum by making the price of doing so the sacrifice of a Section 10(b) defense based on a prior clear and unequivocal contract repudiation." However, our colleague fails to acknowledge that his position, which *immediately* equates a statement indicating repudiation with effective repudiation of a contract, would actually reduce the likelihood of the parties arbitrating future disputes where the agreement provides that option. Under our colleague's view, once an employer (or a union) makes a statement of repudiation the parties would conclude, erroneously under our precedent, that the contract is no longer in effect, notwithstanding subsequent events that might contradict that statement. As a result, the parties presumably would not seek to arbitrate future disputes arising under that contract. Thus, it is our colleague's position that would arguably "discourage[] parties from seeking an arbitral forum" by recognizing a clear repudiation where there has been none, a result that is inconsistent with a general policy favoring arbitration of disputes. Further, his contention that our decision may cause repudiating parties to subsequently forfeit a Sec. 10(b) defense by seeking arbitration merely repeats the error of limiting the nonrepudiating party's ability to consider ambiguous conduct during the 6-month statutory filing period following an alleged repudiation event. Finally, our dissenting colleague claims that *Farmingdale Iron Works*, 249 NLRB 98 (1980), enfd. mem. 661 F.2d 910 (2d Cir 1981), supports his position because the employer in that case continued participating in arbitration in December 1977 after a September 1977 contract repudiation. But in *Farmingdale*, the Board relied on the fact that an employer respondent, "as late as July 5, 1977, participated in arbitration proceedings, pursuant to the contractual grievance procedures," in concluding that there was no clear contract repudiation until September 1977. Id. at 98. The judge in that case also noted another arbitration in which the employer had participated that, while heard in December 1977, had actually been initiated by the union in August 1977 before any clear contract repudiation. Id. at 103. In any event, the Respondent here not only participated in the arbitration proceedings, but also moved to compel their commencement under the very contract it claimed to have repudiated.

[7] The judge also relied on the Respondent's failure to use the Union's "hiring hall" and training programs as evidence of clear contract repudiation. However, the Agreement does not contain an exclusive hiring hall provision or require the Respondent to use its training programs.

The testimony of Union President Stephen Parker—cited by the Respondent on brief—is not to the contrary. During the hearing, Parker was asked when the Respondent stopped complying with the Agreement, to which he responded, "Almost day one. We had to sue him every time to get paid," before explaining that the Union had received benefit payments from the Respondent as part of the settlement of a prior lawsuit. Shortly thereafter, Parker negatively answered the following leading question: "Since December 2010, has Gulf Coast Rebar fulfilled any obligations expected of it under the CBA?" Based on this testimony, the Respondent contends that the Union "had constructive notice of [its] total repudiation of the Agreement" as soon as March 13, 2009 (the date the Agreement commenced), but no later than December 2010. However, in context, Parker's testimony is directed at the Respondent's failure to meet its various payment obligations under specific provisions of the Agreement. Further, Parker's seeming agreement that the Respondent had not "fulfilled any obligations expected of it under the CBA" since December 2010 is ambiguous. That answer might—and likely does—refer only to the Respondent's failure to make various payments, as suggested by the context of earlier testimony that the Union had to sue the Respondent to obtain those payments, rather than to the Respondent's potential noncompliance with the Agreement as a whole.[8]

Based in the foregoing, we find that the Union's charges were timely filed and that Section 10(b) is no bar to a determination that the Respondent violated Section 8(a)(5) and (1) of the Act by its admitted failure to provide the Union with requested relevant information.

III. AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 6 in the judge's decision.

"6. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with requested information that was relevant and necessary for the performance of its duties as the exclusive collective-bargaining representative of unit employees."

[8] Our dissenting colleague contends that Parker's "admission" is "dispositive regarding the existence of a clear and unequivocal repudiation"; however, that argument turns on the erroneous assumption that Parker was referring to a failure by the Respondent to apply any contractual terms. As we have explained, Parker's remarks likely refer only to the Respondent's failure to make various payments under the Agreement.

Similarly, Respondent President Chad Jones's testimonial denial that the Respondent had fulfilled any obligations to the Union since February 2010 is, at most, ambiguous. In context, the reference to "obligations" appears to refer to the Respondent's failure to make the payments required under the Agreement.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to offer Colby Lee full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. We shall further order the Respondent to make Colby Lee whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173, compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6. We shall also order the Respondent to compensate Colby Lee for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Finally, to remedy the Respondent's unlawful failure and refusal to provide relevant and necessary information requested by the Union, we shall order the Respondent to furnish the Union with the information it requested on March 23, 2015.

ORDER

The National Labor Relations Board orders that the Respondent, Gulf Coast Rebar, Inc., Jacksonville, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with closer than normal supervision and discharge because of their membership in and activities on behalf of the Union.

(b) Telling employees that Respondent does not recognize the Union and that they cannot inform other employees of the identity of the union steward.

(c) Telling employees that they should not report grievances about their working conditions to the Union.

(d) Threatening to engage in a physical altercation with employees and threatening employees with discharge because of their membership in and activities on behalf of the Union.

(e) Physically assaulting employees because of their membership in and activities on behalf of the Union.

(f) Falsely reporting to police that employees have committed a physical assault because of the employees' membership in and activities on behalf of the Union.

(g) Threatening employees with discharge unless they remove union stickers from their hardhats.

(h) Removing union stickers from employees' hardhats.

(i) Telling employees that Respondent will not recognize the Union.

(j) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(k) Threatening employees with discharge and unspecified reprisals if they engage in activities on behalf of the Union.

(l) Isolating any employee from other employees because of that employee's membership in or activities on behalf of the Union or to discourage other employees from engaging in such activities.

(m) Discharging or otherwise discriminating against employees for supporting the Union or any other labor organization.

(n) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(o) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Colby Lee full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Colby Lee whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision, as amended in this decision.

(c) Compensate Colby Lee for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(f) Furnish to the Union in a timely manner the information requested by the Union on March 23, 2015.

(g) Within 14 days after service by the Region, post at its Jacksonville, Florida facility, and at every jobsite at which its employees have performed work at any time since March 23, 2015, copies of the attached notice marked "Appendix" in English and Spanish.[9] Copies of the notice on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If there is no appropriate location at a particular jobsite for posting the notice, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to each employee working at that jobsite.[10] If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 23, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, DC September 18, 2017

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[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[10] No party filed exceptions to the judge's inclusion of multiple jobsites and a corresponding contingent mailing requirement in the notice-posting remedy.

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting.

At issue here is whether the Respondent violated Section 8(a)(5) of the National Labor Relations Act (NLRA or Act) when it failed to respond to the Union's March 23, 2015 request for information.[1] The determination of this issue turns on whether the Respondent had previously repudiated, clearly and unequivocally, a Section 8(f) collective-bargaining agreement with the Union.[2] If there was *no* repudiation of the agreement, the Respondent *violated* Section 8(a)(5) of the Act by failing to respond to the Union's information request; if there *was* a repudiation, the Respondent *did not* violate Section 8(a)(5) by failing to respond to the information request, and this allegation must be dismissed.[3]

The judge found the Respondent did repudiate the agreement and he therefore dismissed the Section 8(a)(5) allegation. The judge found that the Respondent clearly and unequivocally repudiated the 8(f) agreement on October 18, 2011. Although established Board law holds that repudiating an 8(f) agreement during its term is an unfair labor practice,[4] Section 10(b) of the Act provides that any charge alleging such a violation must be filed within 6 months after there was clear and unequivocal notice that the 8(f) agreement had been repudiated.[5] According to the judge, the agreement was repudiated clearly and unequivocally on October 18, 2011, and the Union did not file a charge within the subsequent 6-month 10(b) period. As a result, the judge found that (i) the Union lost the right to challenge the repudiation of the 8(f) agreement, (ii) the repudiation caused the Union to cease being the collective-bargaining representative of the Respondent's unit employees, and (iii) because the Union ceased being the unit employees' representative, the Respondent did not violate Section 8(a)(5) of the Act by failing to respond to the Union's March 23, 2015 request for information.[6]

My colleagues disagree with the judge's decision. They find that the Union did *not* have clear and unequivocal notice that the Respondent had repudiated the 8(f) agreement. Accordingly, they find that the Respondent violated Section 8(a)(5) of the Act when it failed to respond to the Union's March 23, 2015 information request.[7]

[1] The complaint alleged that the Respondent committed a number of violations of NLRA Sec. 8(a)(3) and 8(a)(1) in addition to the Sec. 8(a)(5) allegation at issue here. The Respondent admitted these other allegations.

[2] A typical collective-bargaining relationship, governed by Sec. 9(a) of the Act, is based on union support by a majority of employees in the bargaining unit. Under Sec. 8(f) of the Act, however, an employer in the construction industry may lawfully enter into a collective-bargaining agreement with a union without regard to whether a majority of its employees in the bargaining unit support the union. Indeed, under Sec. 8(f) a construction industry employer may enter into a collective-bargaining agreement even if it has no employees at all when it enters into the agreement. (Another name for a Sec. 8(f) agreement is a "pre-hire" agreement.) Sec. 8(f) states in part: "It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement . . . with a labor organization of which building and construction employees are members . . . because . . . the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement . . . ."

[3] For the reasons explained in fn. 13 below, I reject the General Counsel's and Charging Party's alternative rationale for finding the 8(a)(5) violation based on collateral estoppel.

[4] Under well-settled law, either party to a Sec. 8(f) bargaining relationship may repudiate the relationship when the 8(f) collective-bargaining agreement expires, but an 8(f) bargaining relationship may not be repudiated while an 8(f) agreement remains in effect. *John Deklewa & Sons*, 282 NLRB 1375, 1377–1378 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

[5] Sec. 10(b) relevantly states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made," subject to an exception when the charging party "was prevented from filing such charge by reason of service in the armed forces." In *A & L Underground*, 302 NLRB 467 (1991), the Board held that repudiation of a collective-bargaining agreement is not a continuing violation, and therefore the 10(b) period begins to run when the non-repudiating party has clear and unequivocal notice that the agreement has been repudiated.

[6] See *A & L Underground*, 302 NLRB at 468:

> A party who has explicitly repudiated a collective-bargaining agreement should have the right to conclude after the 6-month limitation period has passed without charges being filed that it is free to negotiate a new agreement or, . . . where the repudiation is accompanied by a withdrawal of recognition, to recognize and bargain with a different majority representative or to change employment conditions.

Here, where the evidence indicates, in the judge's words, "that Respondent had a consistent intent, over a long period, to sever completely its relationship with the Union," the Respondent was free—after six months had passed following its clear and unequivocal repudiation of the 8(f) agreement without charges being filed, i.e., after April 18, 2012—to treat the bargaining relationship with the Union as having ended, and accordingly to refuse to respond to the Union's request for information.

[7] The Sec. 8(f) agreement the Respondent repudiated had an expiration date of February 10, 2012. However, it contained a clause provid-

In agreement with the judge and contrary to my colleagues, I would find that the record evidence establishes that the Respondent clearly and unequivocally repudiated the parties' 8(f) agreement no later than October 18, 2011. Consequently, I believe the Respondent's decision not to respond to the March 23, 2015 information request did not violate the Act.

FACTS

The Respondent and the Union entered into a Section 8(f) collective-bargaining agreement (the Agreement) on March 13, 2009. The expiration date of the Agreement was February 10, 2012, but the Agreement contained a clause providing for automatic renewal on an annual basis unless either party gave notice to the contrary. The Agreement required the Respondent to contribute to a variety of union benefit funds. The Respondent stopped making the required payments almost immediately. The Union and the funds sued the Respondent to obtain the unpaid contributions. In December 2010, the parties settled, and the Respondent paid a lump sum for payments due the funds "for the period of June 2009 through July 2009, plus interest." The Respondent never made another payment to any union fund. At the hearing, Union President Stephen Parker testified that the Respondent stopped complying with the Agreement "almost [from] day one" and had not fulfilled any of its obligations under the Agreement since December 2010.

In May 2011, the Union and the trust funds filed another lawsuit against the Respondent in federal district court to obtain unpaid contributions. On October 18, 2011, the Respondent sent the Union a letter stating, in relevant part: "We deny the legality of this contract and believe it to be void[;] nevertheless, . . . to the extent a court deems it not to be void we immediately terminate it." On April 3, 2012, the Respondent filed a motion in the district court lawsuit to compel arbitration.[8]

DISCUSSION

The Board draws a distinction between a simple failure to abide by the terms of a collective-bargaining agreement and an outright repudiation of an agreement. When a party repeatedly fails to abide by certain terms of a collective-bargaining agreement, but *without* completely repudiating the agreement, each act of noncompliance with the contract is a separate and distinct violation for purposes of Section 10(b). Accordingly, the fact that the other party to the contract was on notice of a pattern of noncompliance more than 6 months before filing an unfair labor practice charge does not time-bar a charge filed within six months of a specific instance of noncompliance (although the remedy, if the Board finds a violation, is limited to the 6-month period preceding the charge). See, e.g., *Farmingdale Iron Works, Inc.*, 249 NLRB 98, 99 (1980), enfd. mem. 661 F.2d 910 (2d Cir. 1981). In contrast,

> when an employer completely repudiates the contract, the unfair labor practice is committed at the moment of the repudiation, and the 10(b) period begins to run when the union has clear and unequivocal notice of the repudiation. Any subsequent failures or refusals to honor the terms of the contract do not constitute unfair labor practices themselves, but are simply the effect or result of the repudiation. Accordingly, the union must file its charge within 6 months after receiving clear and unequivocal notice of the repudiation or a complaint based on that conduct will be time-barred, even with regard to contract violations within the 10(b) period.

Vallow Floor Coverings, 335 NLRB 20, 20 (2001) (citing *A & L Underground*, supra).

I believe the facts presented in this case plainly support the judge's findings that the Respondent completely repudiated the Agreement and that the Union had clear and unequivocal notice of repudiation as of October 18, 2011. Again, the evidence shows that (i) the Respondent stopped making payments to union benefit funds in May 2009; (ii) in December 2010, the Respondent settled a lawsuit brought by the funds by making two months' worth of payments (for June and July 2009); (iii) the Respondent never made another payment to any union fund; (iv) the Respondent sent the Union a letter on October 18, 2011, denying the legality of the Agreement, declaring it void, and stating that "to the extent a court deems it not to be void we immediately terminate it"; and (v) Union President Parker admitted under oath that the Respondent stopped complying with the Agreement "al-

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ing that the Agreement would renew automatically from year to year unless timely written notice of intent to modify or terminate the Agreement was given. No such notice was ever given, so the Agreement remained in effect on March 23, 2015, *unless*, as the judge found, the Union failed to file a timely charge in accordance with Sec. 10(b) following the Respondent's clear and unequivocal repudiation of the Agreement.

[8] The district court granted the motion to compel arbitration. On January 7, 2014, the Respondent and the Union participated in a hearing before Arbitrator William P. Hobgood. In that hearing, the Respondent took the position that the Agreement was void from the outset on the grounds that it was obtained by fraud, duress, and misrepresentation. The Respondent did not contend that it had repudiated the Agreement, and the parties did not litigate that issue. On April 9, 2014, the arbitrator issued an award in favor of the Union.

most [from] day one" and had not complied with "any obligations" under the Agreement since December 2010.[9]

The admission by Parker is dispositive regarding the existence of a clear and unequivocal repudiation: our case law holds that the failure to comply with *any* contractual obligations constitutes a complete repudiation of the preexisting agreement. See *Masco Contractor Services East, Inc.*, 346 NLRB 400, 400 fn. 2 (2006) (union representative's credited admission that employer was not complying with collective-bargaining agreement "in any manner" established that union had clear and unequivocal notice that employer had "totally repudiated" the agreement); *St. Barnabas Medical Center*, 343 NLRB 1125, 1127, 1129–1130 (2004) (union had clear and unequivocal notice of contract repudiation relative to disputed RN classifications as of the date the employer refused to apply "*any* part of the contract to *any* of the disputed RNs") (emphasis in original).[10] Moreover, even if Parker's admission is disregarded, the other evidence still compels a finding of clear and unequivocal contract repudiation no later than October 18, 2011, when the Respondent served notice on the Union that the Agreement was "terminate[d]" effective "immediately."[11]

My colleagues reject this reasoning, but I believe their analysis does not withstand scrutiny. They say that "[e]ven assuming, without deciding," that the Respondent's October 2011 letter "could have constituted clear and unequivocal notice to the Union of repudiation," the Respondent sent a "conflicting signal" in April 2012 when it filed its motion to compel arbitration in the district court lawsuit. Based on this "conflicting signal," my colleagues find that "[t]he Respondent's reliance on the October 2011 letter" as placing the Union on clear and unequivocal notice of contract repudiation "is unavailing." In this regard, my colleagues rely on *A & L Underground*, supra. In *A & L Underground*, the Board relevantly stated: "[B]y requiring that a party promptly file a contract repudiation charge, we are not placing any hardship on the party challenging the repudiation. The only parties against whom the bar might be a hardship—those whose delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party—are not barred by our holding." 302 NLRB at 469.

In response to my colleagues' analysis, I believe two points are relevant.

First, the majority's refusal to acknowledge that the Respondent's October 2011 letter constituted clear and unequivocal notice of contract repudiation is immaterial in light of precedent clearly establishing that the October 2011 letter *did* constitute the requisite clear and unequivocal notice. See, e.g., *CAB Associates*, 340 NLRB 1391, 1391–1392 (2003) (employer clearly and unequivocally repudiated agreement when it told the union that it "did not have a contract with the [u]nion"); *Logan County Airport Contractors*, 305 NLRB 854, 861–862 (1991) (employer clearly and unequivocally repudiated agreement when it told the union "the agreement was terminated"); *Dixon Commercial Electric*, 302 NLRB 946, 947 (1991) (employer clearly and unequivocally repudiated the parties' bargaining relationship when it told the union that "it is not bound by the terms of any agreements"). In its October 2011 letter, the Respondent stated that it believed the Agreement was "void," but if a court were to deem otherwise, "we immediately terminate [the Agreement]." Unquestionably, this letter repudiated the Agreement, effective "immediately," and did so clearly and unequivocally.

Second, I disagree that the Respondent's reliance on the October 2011 letter is "unavailing" to establish clear and unequivocal notice of contract repudiation. Rather, what I believe is "unavailing" is my colleagues' reliance on *A & L Underground* to support a finding that a "conflicting signal" near the end of the 10(b) period prevented the 6-month limitations period from running. "Board precedent holds that the 10(b) period begins to run at the time the [u]nion *first has 'knowledge of the facts necessary to support a ripe unfair labor practice.'*" *St. Barnabas Medical Center*, 343 NLRB at 1127 (quoting *Leach Corp.*, 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995)) (emphasis in original). Here, even if one disregards evidence supporting contract repudiation *prior to* October 2011 (i.e., the Respondent's failure to make a single payment to the Union's funds after December 2010 and Union President Parker's admission that the Respondent stopped complying with the Agreement "almost [from] day one" and had not complied with "any obligations" under the Agreement since December 2010), the Union certainly had knowledge of the facts necessary to support a ripe unfair labor practice *no later*

[9] The judge credited Parker's testimony and found it established that the Respondent "has not made any payments to the trust funds for any month after July 2009."

[10] My colleagues say that Parker's admission "likely" referred only to the Respondent's failure to make various payments under the Agreement. I would rely on the statement Parker actually agreed with, i.e., that the Respondent had not "fulfilled any obligations expected of it under the CBA." I also note that my colleagues do not point to any evidence that the Respondent *did* comply with any contractual obligation after December 2010.

[11] Consequently, I find it unnecessary to pass on the judge's alternative finding that the Respondent repudiated the Agreement on January 7, 2014, when it took the position in an arbitral hearing that the Agreement was void from the outset on the basis that the Union procured the Agreement by fraud, duress, and misrepresentation.

than October 18, 2011. My colleagues cite no case in which the Board or any court has ever found a "conflicting signal" sent by a party *after* it expressly repudiated a contract operated retroactively to erase the clear and unequivocal repudiation and prevent the 6-month 10(b) period from running. To the contrary, in those cases where the Board has found that "conflicting signals or otherwise ambiguous conduct" prevented the 10(b) period from beginning to run, *the conflicting signals predated the express repudiation*. See, e.g., *CAB Associates*, 340 NLRB at 1392 (finding that "prior to [CAB's] express repudiation of the 1999-2002 agreement, CAB's conduct was ambiguous and, thus, failed to give the Union the requisite constructive notice"); *Logan County Airport Contractors*, 305 NLRB at 859–862 (finding that 10(b) period started to run when union was advised of the employer's position that "the agreement was terminated" and that events predating this communication did not constitute clear and unequivocal notice of contract repudiation).

The only case my colleagues cite for their after-the-fact "conflicting signal" finding is *A & L Underground*, but that case actually exposes the flaw in the majority's analysis. When the Board in *A & L Underground* held that the 10(b) period does not begin to run based on "conflicting signals or otherwise ambiguous conduct," the Board was clearly holding that the converse was also true: when an explicit contract repudiation *does* occur, the six-month 10(b) period *does* begin running. Nothing in *A & L Underground* suggests that *after* an express contract repudiation occurs, subsequent "conflicting signals" would *retroactively* erase the repudiation and prevent the 6-month 10(b) period from ever starting to run. To repeat, in *A & L Underground*, the Board stated that its holding did not affect parties "whose delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct." 302 NLRB at 469. Once a party does receive clear and unambiguous notice of contract repudiation, any delay in filing an unfair labor practice charge is not and cannot be "*a consequence of* conflicting signals or otherwise ambiguous conduct." Id. (emphasis added). Rather, a party's delay in filing a contract-repudiation charge is a consequence of conflicting signals or ambiguous conduct only when the other party has not yet made its intentions clear. Here, when the Union refrained from filing an 8(a)(5) charge *after* the Respondent made its intentions abundantly clear by informing the Union that the Agreement was "terminate[d]" effective "immediately," that delay could not possibly have been "a consequence" of a so-called conflicting signal sent *almost six months later, in April 2012*.[12]

My colleagues say that my position "would turn Section 10(b) on its head" and would "effectively shorten the statutory filing period for unfair labor practice charges in the contract repudiation context." To the contrary, my analysis is faithful to Section 10(b) and to Board precedent applying Section 10(b) in the contract repudiation context. I recognize that the Union had 6 full months to file a charge after the Respondent put the Union on clear and unequivocal notice that it was repudiating their contract. The Union failed to do so. As a result, the Union lost its opportunity to challenge the repudiation. At least it *should* have lost that opportunity. The majority, however, holds otherwise. Thus, it is the majority's position that turns Section 10(b) on its head, and it renders the Board's case law incoherent. My colleagues cannot say that clear and unequivocal notice of contract repudiation does *not* start the running of the 10(b) period, since our cases state clearly that it does.[13] Yet, in their view, when an employer that has given clear and unequivocal notice of contract repudiation subsequently sends an arguably conflicting signal any time within the next 6 months, the 10(b) period has *not* been running from the date of the repudiation, contrary to Board precedent clearly holding that it has. Put another way, with today's decision nobody will know whether the 10(b) period is running until six months *after* a party gives clear and unequivocal notice of contract repudiation. Until then, the 10(b) period will have a merely conditional existence. It *could* be running—but then

[12] A compelling case can be made that the Respondent clearly and unequivocally repudiated the Agreement well before October 2011. As Union President Parker testified, the Respondent stopped complying with the Agreement "almost [from] day one" and had not complied with "any obligations" under the Agreement since December 2010. See, e.g., *Masco Contractor Services East*, 346 NLRB at 400 fn. 2 (union representative's credited admission that employer was not complying with collective-bargaining agreement "in any manner" established that union had clear and unequivocal notice that employer had "totally repudiated" the agreement). However, because the Respondent clearly and unequivocally repudiated the Agreement no later than October 18, 2011, and because dating the repudiation accordingly disposes of the 8(a)(5) allegation at issue here, I do not pass on whether the Agreement was repudiated before that date, and therefore I need not address my colleagues' arguments in that regard.

[13] See, e.g., *Vallow Floor Coverings*, 335 NLRB at 20 ("[W]hen an employer completely repudiates the contract, the unfair labor practice is committed at the moment of the repudiation, and the 10(b) period begins to run when the union has clear and unequivocal notice of the repudiation."); *St. Barnabas Medical Center*, 343 NLRB at 1127 ("Board precedent holds that the 10(b) period begins to run at the time the [u]nion *first has knowledge of the facts necessary to support a ripe unfair labor practice*.") (emphasis in original; internal quotations omitted).

again, maybe not.[14] This defeats the purpose of Section 10(b)'s 6-month limitations period, which is to permit all parties to reasonably discern the point in time when the possibility of Board litigation over certain actions has ended.

Although it is unnecessary to furnish any further reasons for rejecting the majority's "conflicting signal" rationale, further reasons exist. Thus, I agree with the judge that even if conduct postdating a clear and unequivocal contract repudiation somehow constitutes a "conflicting signal" that erases a prior repudiation and retroactively prevents the 6-month 10(b) period from running from the date of the repudiation, it is unfair and contrary to sound labor policy to treat the Respondent's motion to compel arbitration as such a "conflicting signal." It is unfair because it forces the Respondent to submit to the plaintiffs' choice of a judicial forum in a different case—which likely would have been more costly and time-consuming than arbitration—in order to preserve its repudiation defense in this case. And it is unsound as a matter of policy because federal labor policy favors arbitration,[15] and my colleagues' decision discourages parties from seeking an arbitral forum by making the price of doing so the sacrifice of a 10(b) defense based on a prior clear and unequivocal contract repudiation.[16] Moreover, Board case law is to the contrary. See *Farmingdale Iron Works*, 249 NLRB at 98–99 & fn. 3, 103 (finding date of contract repudiation to be September 1977 where repudiating party participated in arbitration proceedings until December 1977).[17]

In my view, the Union had clear and unequivocal notice of the Respondent's repudiation no later than October 18, 2011. Under Section 10(b) of the Act, the Union had to file and serve a related unfair labor practice charge within 6 months of that date to preserve its right to challenge the repudiation under the NLRA. The Union failed

[14] The practical result of today's decision is that parties will delay charge filing *both* when there are conflicting signals *and* when contract repudiation is clear and unequivocal. In the former situation, parties will reasonably delay based on uncertainty whether the contract has been repudiated. In the latter situation, parties will also reasonably delay in hopes of a subsequent conflicting signal. Indeed, my colleagues' decision gives parties an incentive to *invite* conflicting signals, and their decision provides the script: file a lawsuit regarding a matter that is arbitrable under the repudiated contract, in hopes that the other party will move to compel arbitration.

[15] See Labor Management Relations Act Sec. 203(d) and the Supreme Court's *Steelworkers* trilogy (*Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)).

[16] My colleagues say it is my position that would arguably discourage parties from seeking an arbitral forum "by recognizing a clear repudiation where there has been none." This merely restates their through-the-looking-glass view that a clear and unequivocal contract repudiation is *not* a clear and unequivocal contract repudiation unless and until 6 months have passed without a conflicting signal. For reasons I have already explained, I disagree with this view. More generally, my colleagues suggest that my position has the effect of discouraging arbitration by encouraging parties to abandon their agreements—and any arbitration provisions included therein—at the first clear and unequivocal act of repudiation. *But this effect is the result of my colleagues' own decision*. If subsequent acts could not retroactively nullify a clear and unequivocal repudiation, there would be no such effect.

[17] In *Farmingdale Iron Works*, the employer sent a letter to the union denying any benefit-fund payments were due, but without "explicitly claim[ing] that no contract existed" between the parties. 249 NLRB at 105. The employer also participated in grievance arbitration regarding assignment of unit work, provided payroll records to the union in connection with the arbitration, and allowed the union to inspect documents outside the scope of the arbitration. On these facts, the judge and the Board found no repudiation. Instead, they found that the contract was repudiated in September 1997 when the employer transferred work to an alter ego company. The judge stated that he could not "conceive of a more forceful manner in which a labor organization might become aware that an employer has repudiated, or is seeking to repudiate, its bargaining obligations," id., notwithstanding that the employer continued to participate in arbitration proceedings through December 1997. Here, the Respondent's conduct up to and including its letter of October 18, 2011, was even clearer than the employer's conduct in *Farmingdale Iron Works*. As discussed above, the Respondent had not complied with any of its contractual obligations since December 2010, and on October 18, 2011, it sent the Union a letter stating, "We deny the legality of this contract and believe it to be void[;] nevertheless, . . . to the extent a court deems it not to be void we immediately terminate it." To borrow the wording of the judge in *Farmingdale Iron Works*, I cannot conceive of a more forceful manner in which a labor organization might become aware that an employer has repudiated its contractual obligations.

In addition to arguing that the Respondent's motion to compel constituted a "conflicting signal" regarding repudiation, the General Counsel and the Charging Party assert that Arbitrator Hobgood's award in favor of the Union defeats the Respondent's repudiation defense. Specifically, they argue that the Board should apply collateral estoppel to find that Arbitrator Hobgood's decision precludes the Respondent from asserting its repudiation defense in this proceeding. Their argument fails on two counts. First, it is well settled that the Board is not collaterally estopped by the resolution of private claims asserted by private parties. See *Field Bridge Associates*, 306 NLRB 322, 322 (1992), enfd. sub nom. *Service Employees Local 32B-32J v. NLRB*, 982 F.2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993). Second, even if the Board would otherwise apply collateral estoppel, the requisite elements are not present here. The doctrine of collateral estoppel holds that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979). Among other elements, the determination by the first forum "must be over an issue which was actually litigated in the first forum." *NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31, 34 (1st Cir. 1987); see *Harvey's Resort Hotel*, 271 NLRB 306, 306 (1984) ("[I]f a matter is not actually litigated in the first proceeding, . . . then collateral estoppel is inapplicable because the issue is in reality being litigated for the first time in the second proceeding."). Without addressing whether an arbitral forum constitutes "a court of competent jurisdiction" for collateral estoppel purposes, Arbitrator Hobgood's award cannot have collateral estoppel effect in the instant proceeding because the parties did not litigate the issue of contract repudiation in the arbitral proceeding.

to do so. As a result, the Union is no longer the collective-bargaining representative of the Respondent's unit employees,[18] and the Respondent did not violate Section 8(a)(5) of the Act by failing to respond to the Union's request for information.[19] Accordingly, I respectfully dissent.

Dated, Washington, D.C. September 18, 2017

Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with closer than normal supervision and discharge because of your membership in and activities on behalf of the Union.

WE WILL NOT tell you that we do not recognize the Union and that you cannot inform other employees of the identity of the union steward.

WE WILL NOT tell you that you should not report grievances about your working conditions to the Union.

WE WILL NOT threaten to engage in a physical altercation with you and threaten you with discharge because of your membership in and activities on behalf of the Union.

WE WILL NOT physically assault you because of your membership in and activities on behalf of the Union.

WE WILL NOT falsely report to police that you have committed a physical assault because of your membership in and activities on behalf of the Union.

WE WILL NOT threaten you with discharge unless you remove union stickers from your hardhats.

WE WILL NOT remove union stickers from your hardhats.

WE WILL NOT tell you that we will not recognize the Union.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT threaten you with discharge and unspecified reprisals if you engage in activities on behalf of the Union.

WE WILL NOT isolate you from other employees because of your membership in or activities on behalf of the Union or to discourage other employees from engaging in such activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Union or any other labor organization.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Colby Lee full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Colby Lee whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Colby Lee for the adverse tax consequences, if any, of receiving a lump-sum backpay

[18] See supra fn. 6.

[19] A minor caveat must be added. Even after an 8(f) bargaining relationship ends, a union may be entitled to information pertaining to events that occurred during the term of the agreement, so long as it requests the information within a reasonable period of time after the contract expires. See *Audio Engineering*, 302 NLRB 942 (1991). Here, the Union's information request covered certain events from "January 1, 2011 to the present." However, the request was tendered on March 23, 2015, roughly three-and-a-half years after the Respondent repudiated the Agreement (October 18, 2011) and 3 years after the Respondent was entitled to treat the bargaining relationship as having ended (April 18, 2012). This was far too late to come within the holding of *Audio Engineering*, where the request for information was made 4 months after the contract expired.

award, and WE WILL file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Colby Lee, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL furnish to the Union in a timely manner the information requested by the Union on March 23, 2015.

GULF COAST REBAR, INC.

The Board's decision can be found at www.nlrb.gov/case/12-CA-149627 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Caroline Leonard, Esq. and *Christopher Zerby, Esq.,* for the General Counsel.
James Allen, Esq., of Villa Hills, Kentucky, for the Respondent.
Michael A. Evans, Esq. (Hartnett Gladney Hetterman, LLC), of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. Respondent repudiated an 8(f) collective-bargaining agreement during its term, but more than 6 months before the filing of any unfair labor practice charge. Because 10(b) barred proceeding on this withdrawal of recognition, Respondent did not violate Section 8(a)(5) when it later refused a union information request. Respondent admitted certain other violations alleged in the complaint.

Procedural History

This case began on April 7, 2015, when the Charging Party, the Iron Workers Regional District Council, affiliated with International Union of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL–CIO (the Union), filed a charge against Respondent, Gulf Coast Rebar, Inc., in Case 12–CA–149627.

On April 13, 2015, the Union filed a charge against Respondent in Case 12–CA–149943. The Union amended this charge on July 15, 2015.

On April 14, 2015, the Union filed a charge against Respondent in Case 12–CA–150071. It amended this charge on July 15, 2015.

On April 28, 2015, the Union filed charges against Respondent in Cases 12–CA–151050 and 12–CA–151091 and amended each of these charges on July 15, 2015.

On July 31, 2015, the Regional Director for Region 12, acting for and with authority delegated by the Board's General Counsel, issued an Order consolidating cases, consolidated complaint, and notice of hearing (the complaint). Respondent filed an answer and affirmative defenses on August 13, 2015, an amended answer and affirmative defenses on December 6, 2016, and a second amended answer and affirmative defenses on December 12, 2015.

On December 15, 2015, a hearing in this matter opened before me in Tampa, Florida. During the hearing, the General Counsel orally moved to amend complaint paragraphs 5(c), 9(d), and 12, and I granted that motion.[1] Complaint paragraph 12, as amended, alleges that "by the conduct described above in paragraphs 9(a) through 9(d), Respondent has been discriminating in regard to the hire and tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act." After all parties had the opportunity to present evidence, the hearing closed on that same date. Thereafter, all parties filed briefs, which I have carefully considered.

Admitted Allegations

Respondent's second amended answer and affirmative defenses (for brevity, the answer) admitted a number of allegations. Additionally, it entered into a written stipulation which was placed in the record as a joint exhibit. Based on those admissions, I find that the General Counsel has proven the allegations in complaint paragraphs 1(a) through (i), 2(a) through (c), 4, 5(a) and (b), 6(a) through (c), 7(a) through (c), 8(a) through (e), 9(a) through (d), 10(a) through (c), 11, and 12.

More specifically, I find that the Government has proven that the Union filed and served the charges as alleged.

Further, I find that at all times material to this case, Respondent has been a contractor in the construction industry engaged in the installation of rebar, that it performed this work at various jobsites in Florida and Georgia, and that it has an office and place of business in Jacksonville, Florida. Additionally, I conclude that Respondent, a Florida corporation, is an employer engaged in commerce within the meaning of Section

[1] As amended, complaint par. 5(c) alleges that "from on or about February 11th, 2008 to present, based on Section 9(a) of the Act, the Union has been the limited exclusive collective bargaining representative of the unit."

Complaint par. 12, as amended, alleges that "by the conduct described above in par. 9(a) through (d), Respondent has been discriminating in regard to the hire and tenure of terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Sec. 8(a)(1) and (3) of the Act. "

2(2), (6), and (7) of the Act and that it is appropriate for the Board to assert jurisdiction in this matter.

Respondent also has admitted, and I find, that its president and owner, Chad Jones, and its operations manager, Mike Adams, are its supervisors and agents within the meaning of Section 2(11) and (13) of the Act.

Based on Respondent's admission of the allegations in complaint paragraph 5(a), I find that the following employees constitute a unit appropriate for collective bargaining (the unit) within the meaning of Section 9(a) of the Act:

> All employees performing craft work within the geographical areas stated in Article XXI of the collective-bargaining agreement between Respondent and the Union working in connection with field fabrication, handling, racking, sorting, cutting, bending, loading and unloading, hoisting, placing, burning, welding and tying of all materials used to reinforce concrete construction; realigning of reinforcing iron, wire mesh placing, bricking, pulling and similar reinforcing materials, placing steel dowels as well as refastening and resetting same while concrete is being poured; reinforcing steel and wire mesh in roadway and sidewalks in connection with building construction; the handling or placing of "J" or Jack bars on slip form construction, the placing of all clips, bolts and steel rods and wire fabric or mesh pertaining to gunite construction, the placing of steel-tex or paper- back mesh used primarily for reinforcing and placing wire mesh to reinforce gypsum roof construction; post tensioning: all loading and unloading, hoisting, placing and tying of all post tensioning cables, wrecking of cones, wedging of the tendons, stressing, cutting and repairing; any other work related to the above work; and any work assigned and agreed-upon on a specific jobsite.

Respondent also has admitted the allegations in complaint paragraph 5(b). Therefore, I find that on March 13, 2009, it entered into a collective-bargaining agreement with the Union whereby it recognized the Union as the exclusive collective-bargaining representative of the employees in the unit described above without regard to whether the Union's majority status had ever been established under Section 9(a) of the Act. On its face, this agreement was effective during the period from February 11, 2008, to February 10, 2012. However, it also provided that it would renew automatically each year thereafter unless timely written notice was given in accordance with the terms of article XXII of the collective-bargaining agreement.

Respondent has admitted all allegations raised in complaint paragraph 6. Accordingly, I find that on or about April 13, 2015, Respondent, by Mike Adams, at its Boggy Creek, Florida jobsite: (a) threatened employees with closer than normal supervision and discharge because of their membership in and activities on behalf of the Union; (b) told employees that Respondent does not recognize the Union and that they could not inform other employees of the identity of the union steward; and (c) told employees that they should not report grievances about their working conditions to the Union. Moreover, based on Respondent's admission of the allegations in complaint paragraph 11, I conclude that this conduct interfered with, restrained, and coerced employees in the exercise of their Section 7 rights, and thereby violated Section 8(a)(1) of the Act.

Respondent also has admitted all allegations raised in complaint paragraph 7. Therefore, I find that on or about April 14, 2015, the Respondent, by Mike Adams, at its Poinciana, Florida jobsite: (a) threatened to engage in a physical altercation with employees and threatened employees with discharge because of their membership in and activities on behalf of the Union; (b) physically assaulted its employees because of their membership in and activities on behalf of the Union; and (c) falsely reported to police that employees had physically assaulted him because of the employees' membership in and activities on behalf of the Union.

Based on Respondent's admission of the allegations in complaint paragraph 11, I conclude that this conduct interfered with, restrained, and coerced employees in the exercise of Section 7 rights, in violation of Section 8(a)(1) of the Act. Additionally, based on Respondent's admission of the allegations in complaint paragraph 12, I conclude that by engaging in this conduct, Respondent discriminated in regard to the hire and tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act.

Respondent also has admitted the allegations raised in complaint paragraphs 8(a), (b), and (c). Based on these admissions, I find that on or about April 17, 2015, Respondent, by Mike Adams, at its Poinciana, Florida jobsite: (a) threatened employees with discharge unless they removed union stickers from their hardhats; (b) removed union stickers from employees' hardhats; and (c) told employees that Respondent would not recognize the Union. As Respondent also admitted, I find that this conduct violated Section 8(a)(1) of the Act.

Complaint paragraph 8(d) alleges that on or about April 17, 2016, Respondent, by Mike Adams, its Poinciana, Florida jobsite, created an impression among its employees that their union activities were under surveillance by Respondent. Respondent's answer stated:

> Respondent admits to the actions alleged in the paragraph but has insufficient knowledge as to the impressions of others concerning those actions. Respondent, despite its specific lack of knowledge concerning the impressions of others, admits the alleged actions may have caused employees to reasonably possess the impression they were under surveillance by Respondent.

In view of this admission and Respondent's admission of the allegations in complaint paragraph 11, I find that Respondent engaged in the conduct alleged in complaint paragraph 8(d) and thereby violated Section 8(a)(1) of the Act.

Respondent has admitted that, as alleged in complaint paragraph 8(e), on about April 17, 2015, at its Poinciana, Florida jobsite, Operations Manager Mike Adams threatened employees with discharge and unspecified reprisals if they engaged in union activities. Respondent has further admitted, as alleged in complaint paragraph 11, that it thereby violated Section 8(a)(1) of the Act. I so find.

Respondent has admitted all allegations set forth in complaint paragraph 9 and its various subparagraphs. It also has admitted the legal conclusions alleged in complaint paragraphs

11 and 12. Based on those admissions, I find that: (a) on about April 13, 2015, Respondent discharged its employee Colby Lee; (b) on or about April 14, 2015, after reinstating Lee, Respondent isolated Lee from its other employees; (c) that by this conduct and the conduct alleged in complaint paragraphs 7(a) through (c), Respondent caused the termination of Lee's employment on about April 14, 2015. Further, I conclude that Respondent thereby violated Section 8(a)(1) and (3) of the Act.

Based on Respondent's admission of the allegations in complaint paragraph 10(a), I find that since on or about March 23, 2015, the Union has requested in writing that Respondent furnish the Union with the following information:

> (1) Identify all current employees of the Company. For each such employee, identify his/her: (a) name, (b) job classification, (c) address, (d) phone number, (e) date of birth, (f) email address, and (g) date of hire.
>
> (2) Identify all employees of the Company for the period of January 1, 2011 to the present. For each such employee, identify his/her: (a) name, (b) job classification, (c) address, (d) phone number, (e) date of birth, (f) email address, (g) date of hire, and (h) date of termination (if applicable);
>
> (3) Identify each project where the Company is currently performing work. For each such project, identify: (a) the address of the project, (b) the general contractor on the project, (c) all entities with which the Company has contracted to perform work on the project, (d) the type of work performed by the Company on the project, (e) the date the project began, (0 the date the project is expected to conclude, and (g) the dollar value of the Company's work on the project.
>
> (4) Identify each project where the Company has performed work for the period of January 1, 2011, to the present. For each such project, identify: (a) the address of the project, (b) the general contractor on the project, (c) all entities with which the Company has contracted to perform work on the project, (d) the type of work performed by the Company on the project, (e) the date the project began, (f) the date the project concluded (if applicable), and (g) and the dollar value of the Company's work on the project.

Complaint paragraph 10(b) alleges that this requested information is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. Respondent admits this allegation and I so find. Respondent also has admitted the allegations in complaint paragraph 10(c). Therefore, I find that since about March 23, 2015, Respondent has failed and refused to furnish the Union with this requested information.

However, Respondent has denied the allegation, in complaint paragraph 13, that its failure and refusal to furnish the Union with this requested information violates the Act. That legal issue turns on whether, at that time, Respondent had a duty to provide the information. Whether such a duty existed depends on whether the Union then was the exclusive bargaining representative of the unit of Respondent's employees, an allegation that Respondent denies. That issue will be discussed below.

Labor Organization Status

Complaint paragraph 3(a) alleges that, at all material times, the Iron Workers' Regional District Council has been a labor organization within the meaning of Section 2(5) of the Act. Complaint paragraph 3(b) alleges that at all material times, Local 846, International Union of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL–CIO (Local 846) has been a labor organization within the meaning of Section 2(5) of the Act. Complaint paragraph 3(c) alleges that at all material times, Local 846, International Union of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL-CIO (Local 846) has been a labor organization within the meaning of Section 2(5) of the Act.

Although Respondent's answer did not admit these allegations, at hearing Respondent stipulated that "the Regional District Council and Locals 846 and 847 of the International Union of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, AFL-CIO, are organizations that exist for the purpose of dealing with employers concerning terms and conditions of employment, including by negotiating contracts and by processing grievances." Additionally, Respondent stipulated "that employees participate in the Regional District Council, Locals 846 and 847 as members by attending meetings and by voting on officers and proposals."

Based on Respondent's stipulations and the record as a whole, I conclude that the General Counsel has proven the allegations raised in complaint paragraphs 3(a), (b), and (c). Therefore, I find that Locals 846 and 847, International Union of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL-CIO and the Iron Workers' Regional District Council are labor organizations within the meaning of Section 2(5) of the Act.

The 8(a)(1) and (3) Allegations

Respondent has admitted all of the independent 8(a)(1) allegations and all of the 8(a)(1) and (3) allegations alleged in the complaint. Because Respondent has admitted, in each such instance, both the alleged conduct and the legal conclusion that the conduct violated the Act, no further discussion is necessary, except for the allegations raised in complaint paragraph 6(b).

Complaint paragraph 6(b) alleges that on about April 13, 2015, Respondent told employees that Respondent does not recognize the Union and that they could not inform other employees of the identity of the union steward. For the reasons discussed below, I have concluded that Respondent did not have a duty to recognize the Union on March 23, 2015, when the Union made an information request, and for those same reasons Respondent did not have a duty to recognize the Union later. Under these circumstances, the April 13, 2015 statement that Respondent did not recognize the Union does not interfere with, restrain, or coerce employees in the exercise of Section 7 rights. Therefore, I do not recommend a remedy for this conduct, even though Respondent has admitted it thereby violated the Act.

Although I conclude that Respondent did not violate Section 8(a)(1) by telling employees on April 13, 2015, that it did not recognize the Union, I conclude that the other conduct alleged in complaint paragraph 6(b), prohibiting employees from in-

forming other employees of the "identity of the union steward" does interfere with, restrain, and coerce them in the exercise of Section 7 rights. Even if there were no union steward on the jobsite, there well might be an employee seeking to persuade others to join and support the Union or with other ties to the Union and employees reasonably would understand the prohibition to include speaking with that person about the Union. Applying an objective standard, I conclude this statement, which restricted employee discussion of union-related matters, reasonably would chill the exercise of Section 7 rights and therefore violated Section 8(a)(1). Moreover, Respondent has admitted that the alleged conduct violated that section. Therefore, I have included a reference to this violation in the recommended Order and in the notice to employees.

The 8(a)(5) Allegations

Respondent has admitted all facts necessary to establish that it violated Section 8(a)(1) and (3) of the Act as alleged in the complaint. The remaining issues concern whether Respondent acted lawfully when it failed and refused (as it has admitted) to furnish information requested by the Union.

The 8(f) Agreements

This case focuses on a bargaining relationship which arose under Section 8(f) of the Act, a provision which applies to the building and construction industry but not to other employers. Therefore, the following background may be helpful.

In general, the Act imposes on an employer the duty to recognize and bargain with a union when it represents a majority of the employees in a unit appropriate for collective bargaining. Section 9(a) of the Act makes such a union the exclusive representative of those employees. It states:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided* further, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 159(a).

Except in the construction industry, an employer that recognizes a union which has *not* been designated or selected by a majority of bargaining unit employees thereby violates the Act. However, the fluidity of work in the construction industry makes application of this principle difficult. A construction contractor bids on projects at many different locations. If awarded a contract, the employer typically hires workers for that particular project, their employment ending when the job is completed.

Accordingly, Congress included in the Act an exception which allows a construction contractor to enter into an agreement with a union which does not then represent a majority of employees in an appropriate unit. This exception makes it easier for a contractor to obtain skilled workers when it begins a project at a new location and increases the employment opportunities for such workers. The exception appears in Section 8(f) of the Act, which begins as follows:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsection (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [section 159 of this title] prior to the making of such agreement. . . .

29 U.S.C. § 158(f).

However, when a construction industry employer signs a prehire agreement with a union pursuant to this exception, that recognition does not create a permanent bargaining relationship surviving the expiration of the contract. Thus, there are significant differences between the status of a union entitled to recognition because it enjoys the support of a majority of bargaining unit employees (a "9(a)" union) and one recognized under the 8(f) exception.

When a collective-bargaining agreement expires, a 9(a) union enjoys a presumption that a majority of employees continue to support it and thus remains the exclusive bargaining representative absent proof to the contrary. In contrast, a union recognized pursuant to the 8(f) exception never had to establish its majority support, and its status as exclusive bargaining representative expires with the contract.[2]

An Employer's Duty to Furnish Information

For purposes of administering the collective-bargaining agreement during its term, it does not matter whether an employer recognized the union pursuant to Section 8(f) or 9(a). In either case, the employer has a duty to furnish the exclusive representative with requested relevant information which the union needs to perform its function. The difference is that an 8(f) union's entitlement to the information ends when the contract expires because, at that point, the 8(f) union stops being the employees' exclusive representative.

If a collective-bargaining agreement includes a clause

[2] Because the 8(f) union and the 9(a) union possess essentially the same authority as exclusive bargaining representative during the term of the contract, the 8(f) union sometimes is said to have "limited" 9(a) status. A union recognized pursuant to Sec. 8(f) can attain full 9(a) status by securing the support of a majority of bargaining unit employees, but the Government does not make such a claim in the present case. Rather, complaint par. 5(c), as amended at the hearing, alleges that "based on Section 9(a) of the Act, the Union [was] the limited exclusive collective bargaining representative of the Unit."

providing for automatic renewal under certain circumstances. In the present case, the collective-bargaining agreement does have such a provision, quoted in full below, which extends the contract for an additional year unless Respondent gives the kind of notice it specifies. The General Counsel argues that Respondent failed to satisfy the notice requirements, which kept the contract alive and, along with the contract, the Union's status as exclusive bargaining representative.

The Government contends that, because of these extensions of the contract's term, it remained in effect on March 23, 2015, when the Union made the information request described above under "Admitted Allegations." Because the contract remained alive, the Government argues, so did the Union's status as exclusive bargaining representative and, therefore, its entitlement to receive the information it had requested. Therefore, under the General Counsel's theory, Respondent's refusal to furnish the information breached its duty to bargain with the Union and violated Section 8(a)(5) of the Act.

As discussed above, Respondent has admitted that the Union made the alleged information request, has admitted that the requested information is necessary for and relevant to the Union's performance of its duty as exclusive bargaining representative, and also has admitted that it has failed and refused to furnish the information. Thus, Respondent has admitted all but one of the elements necessary for the General Counsel to prove a violation of Section 8(a)(5).

However, Respondent denies that the collective-bargaining agreement remained in effect at the time the Union made the information request, and denies that the Union remained the exclusive bargaining representative. To prove a violation, therefore, the General Counsel must establish by a preponderance of the evidence that the collective-bargaining agreement survived its stated expiration date of February 10, 2012, by extending itself automatically, and again extended itself automatically in February 2013, 2014, and 2015.

In addition to denying that the contract remained in effect, Respondent also has raised a timeliness defense based on the 6-month limitation in Section 10(b) of the Act. It bears the burden of proving that the unfair labor practice charges were not timely.

Did the Agreement Renew Automatically?

Respondent has admitted that on about March 13, 2009, it entered into a collective-bargaining agreement with the Union. The agreement includes the following provision, article XXII, which specifies the effective dates and what notice is necessary to terminate the contract:

> DURATION AND TERMINATION
>
> Section 1. This Agreement shall become effective on February 11, 2008 and remain in full force and effect until midnight of February 10, 2012, and, unless written notice is given by either party to the other by certified or registered mail at least four (4) months prior to such date of a desire for change or termination, this Agreement shall continue in effect for an additional year thereafter. In the same manner, this Agreement, with any amendments thereof, shall remain in effect from year to year thereafter, subject to termination at the expiration of any such contract year upon notice in writing given by either party to the other at least four (4) months prior to the expiration of such contract year. Any such notice as provided for in this Section, whether specifying a desire to terminate or to change at the end of the current contract year, shall have the effect of terminating this Agreement at such time.

Based on this language, I conclude that the collective-bargaining agreement could not be terminated before midnight of February 10, 2012. To cause it to be terminated at that time, Respondent had to give notice before midnight, October 10, 2011. Moreover, such notice had to be by certified or registered mail.

If Respondent failed to give such notice by October 10, 2011, then the collective-bargaining agreement would extend itself automatically for another year, that is, it would continue in effect until February 10, 2013. To terminate the agreement on that date, Respondent had to give notice, by registered or certified mail, no later than October 10, 2012. Absent such notice, the contract again would extend itself for a year, remaining in effect until February 10, 2014. On that date, the agreement either would extend itself automatically until February 10, 2015, or else would expire, depending on whether or not Respondent had given the prescribed notice by October 10, 2013.

If the agreement remained in effect until February 10, 2015, and Respondent had failed to give the prescribed notice by October 10, 2013, then the contract would again extend itself automatically for a year.

The complaint alleges that Respondent began violating Section 8(a)(5) on March 23, 2015, the date the Union made the information request described above. Therefore, the Government must prove that the collective-bargaining agreement remained in effect on that date. If the agreement had expired before March 23, 2015, then the Union no longer was the exclusive bargaining representative when it made the information request and Respondent had no duty to furnish the information.

Thus, the General Counsel bears the burden of proving that the collective-bargaining agreement automatically extended itself for a year on February 10, 2012, that it again extended itself automatically for a year on February 10, 2013, that it extended itself automatically for another year on February 10, 2014, and that on February 10, 2015, it again extended itself for a year. If any one of these contract extensions did not occur, then the agreement expired before March 23, 2015, and the Union was not the exclusive bargaining representative on that date.

The Benefit Fund Contributions

The complaint does not allege that Respondent violated the Act by failing to make payments to fringe benefit funds as required by the collective-bargaining agreement. However, a dispute about benefit fund payments did arise between the Union and Respondent, and the events in that dispute have some relevance in deciding whether Respondent ever gave sufficient notice to terminate the contract. The facts surrounding this dispute also have relevance to Respondent's 10(b) defense.

The collective-bargaining agreement which Respondent

signed in March 2009 obligated it to make payments to fringe benefit trust funds.[3] It appears that Respondent made such payments through May 2009 but not thereafter.

The trust funds filed a lawsuit against Respondent in the United States District Court for the Northern District of Illinois. On December 20, 2010, the trust funds and Respondent entered into a settlement agreement which ended this litigation. The settlement provided that Respondent would pay to the trust funds a total of $13,710.59 "representing principal due of $10,473.53 for the period of June 2009 through July 2009, plus interest."

Crediting the testimony of the Union's regional district council president, Stephen Parker, I find that Respondent has not made any payments to the trust funds for any month after July 2009.

Respondent presented evidence that it tried to terminate the collective-bargaining agreement. Respondent's president, Chad Jones, testified as follows:

> Q. BY MR. ALLEN: What is your understanding of how to terminate the contract according to this—
>
> MS. LEONARD: Objection, Your Honor. The witness' understanding is not relevant.
>
> JUDGE LOCKE: Overruled. You may answer.
>
> THE WITNESS: Yes, sir. You have to send a letter certified 120 days before the expiration of the contract.
>
> Q. BY MR. ALLEN: Did you ever send such a letter?
> A. Yes.
>
> Q. When did you send that letter?
> A. 2009—10/2009.
>
> Q. When in 2009?
> A. Ten.
>
> Q. What date in 2009?
> A. 10/15/2009, I believe.
>
> Q. October 15th, 2009?
> A. Uh-huh.
>
> Q. Did you send that letter by certified mail?
> A. No, sir.
>
> Q. Why didn't you send that by certified mail?
> A. I just—I just overlooked the contract, just sent it.

The Union denies that it received this October 15, 2009 letter. In any event, it is clear that such a letter could not prevent the contract from renewing automatically on its expiration date, February 10, 2012, because Jones did not send it by certified or registered mail, as the contract required.

Respondent introduced a copy of this October 15, 2009 letter into evidence. It is not addressed to either Local 846 or Local 847 and also is not addressed to the Iron Workers' Regional District Council. Rather, the letter is addressed to the "Regional District Council Training Trust." It states:

> To Whom It May Concern:
>
> This letter is to inform you in writing that due to the downfall in the economy; we are no longer in need of the services provided by the Local 846 Union. According to contract agreement, we are to give you 30 day notice of termination of agreement.

The reference to "30 day notice" is puzzling because the collective-bargaining agreement required 4 months' notice, not 30 days. It may be that Respondent executed a separate document with the benefit trust fund and that such an agreement required a 30-day notice to terminate. In any event, the fact that Jones addressed the letter not to the Union but to a benefit fund leads me to conclude that it did not constitute, and Jones did not intend it to constitute, the notice required to terminate the collective-bargaining agreement.

As noted above, the Union denies receiving the October 15, 2009 letter and the record raises some doubts about whether Jones really sent it. For one thing, Respondent did not produce this letter in defending against a Federal lawsuit filed by the Union in May 2011 or in a related arbitration hearing which took place on January 7, 2014. Since it was in Respondent's interest to produce the letter at that hearing, Respondent's failure to do so allows the possibility that the letter did not then exist.

Jones offered a rather vague explanation that the Federal Bureau of Investigation had impounded the letter in connection with some sort of investigation[4] but I found this testimony unilluminating and not very convincing.

Jones claimed that he later enclosed a copy of this October 15, 2009 letter with another letter which he mailed to Local 846 on February 10, 2010.[5] However, the letter itself bears a date of February 19, 2010. It states:

> Enclose [sic] are the reports forms that justify the sum of, $14,320.87. Please advise me if this total is accurate, so we can fulfill our obligations to the Local 846 Union. If there are any outstanding contributions that are due please advise me in writing within (7) seven days.

This letter neither mentions termination of the collective-bargaining agreement nor indicates that an earlier letter, seeking to terminate the agreement, was enclosed. Nonetheless, Jones claims that he did enclose a copy of the earlier October 15, 2009 letter.

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[3] Art. XVII required Respondent to make payments to the Rebar Retirement Plan and Trust (a pension fund), to the Local 846 Rebar Welfare Trust (health and welfare plan), to the Local 846 Vacation Trust (vacation plan), and to the Local 846 Training Trust (apprentice and journeyman training plan).

[4] The record does not establish whether the FBI was investigating Respondent, the Union, or some other person or entity.

[5] The letter is addressed to the attention of "Steve Parker." Although his title does not appear on the letter, Parker is the president of the Union's regional district council.

Jones sent this package by certified mail, return receipt requested, with restricted delivery to "Steve Parker." The envelope bears a stamp, presumably placed there by a Postal Service employee, indicating that someone had refused receipt.

The reason for the refusal is not entirely clear. Delivery of the certified letter was restricted to Parker, himself, so it is possible that he was not available to sign for it when it arrived. It is also possible that someone on Parker's staff refused service because the letter had been sent with insufficient postage.

Because the Union refused receipt of the February 19, 2010 letter, it is not necessary to credit or discredit Jones' testimony that he enclosed with that letter a copy of the earlier October 15, 2009 letter. However, there are some reasons to doubt this testimony.

For one thing, the latter makes no reference to an October 15, 2009 letter. Moreover, the February 19, 2010 letter gives no indication of any intent to terminate the contract. If anything, the brief text of that letter would be consistent with an intent to comply with the terms of the collective-bargaining agreement. Nothing in the letter conveys a message that Respondent would not be making further payments in the future, in accordance with the contract's terms.

The inconsistencies in Jones' testimony (for example, his testimony that he sent the February 19, 2010 letter on February 10) and the vagueness of Jones' explanation concerning the letter being impounded by the FBI, lead me to believe his testimony is not as reliable as that of Stephen Parker. Crediting the latter, I conclude that the Union did not receive the October 15, 2009 letter either in October 2009 or later in February 2010.

The Union placed in evidence a letter dated February 18, 2010, purportedly from Jones, as Respondent's president, to Local 846 and to the attention of Parker. This letter, however, is unsigned. Parker testified that the Union did not receive it until a June 30, 2015 mediation meeting related to the Federal lawsuit discussed below.

It would have been in Respondent's interest to introduce this February 18, 2010 letter at the January 7, 2014 arbitration and its failure to do so raises doubt not dispelled by Jones' nebulous testimony concerning an FBI impoundment. Moreover, this letter, or at least the copy in evidence, bears no signature. In sum, credible evidence does not establish that Respondent sent the February 18, 2010 letter to the Union on that date and I conclude that it did not.

As discussed above, the record does not establish that Respondent made payments to the fringe benefit trust funds for any month after July 2009. On May 31, 2011, the Union and the trust funds filed a lawsuit, seeking such payments from Respondent, in the United States District Court for the District of Oregon.

On October 18, 2011, Respondent's attorney, Dale J. Morgado, sent a letter to Iron Workers Local 846 and Iron Workers Local 847. It stated:

> My client, Gulf Coast Rebar, Inc., through its President, Chad Jones, sent you a termination letter several months ago terminating the contract dated March 13, 2009, between your Locals and his company, which is the subject of the current lawsuit pending before the United States District Court for the District of Oregon, Case No. 3:11-CV-658. We deny the legality of this contract and believe it to be void, nevertheless, this letter is to affirm that which my client has already done and to the extent a court deems it not to be void we immediately terminate it. If you have questions, don't hesitate to contact me. Thank you.

Although this October 18, 2011 letter referred to a "termination letter" which Respondent's president sent to the Union "several months ago," the president of the Union's regional district council, Stephen Parker, testified that the Union never received that earlier letter.[6]

The Union's attorney, James R. Kinney, replied to Morgado in a letter dated February 10, 2012. This reply referred to Morgado's client as "Gulf Coast Placers," the name Respondent used when it first began doing business. The letter stated:

> Your October 18, 2011 letter purporting to terminate your client, Gulf Coast Placers' collective bargaining agreement with Regional Local Union No. 486 and 847, has been forwarded to me for response. My clients have no record of a prior attempt by your client to terminate the contract. In addition, your letter is ineffective to terminate the contract, inasmuch as it fails to comply with the requirements of Article XXll of the Agreement.
>
> Therefore, the Unions consider the collective bargaining agreement to remain in full force and effect. If you have contrary information showing that you or your client have actually complied with the requirements of the collective bargaining agreement with respect to termination, please forward it to me.
>
> My client reserves the right to take any and all available action, to include the filing of a Grievance, Unfair Labor Practice, or a claim in U.S. District Court.
>
> Please feel free to contact me should you have any questions regarding this matter.

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[6] Parker testified as follows:

Q. Okay. Did the RDC or the locals ever receive such a letter as referenced here in the letter?
A. No.

Q. Okay. Did you review your files after you received this letter in 2011?
A. Yes.

Q. Did you find anything?
A. No.

Q. Did you have the locals review their files—
A. Yes.

Q. — in 2011? Did they find anything?
A. No.
Q. Did you review your files again in preparation for this hearing?
A. Yes.

Q. And did you find any letters from Chad Jones—
A. No.

Although the letter stated that the Union "reserves the right to take any and all available action, to include the filing of a . . . claim in U. S. District Court," the Union and the benefit trust funds already had taken that step.

They based the lawsuit on provisions the collective-bargaining agreement requiring Respondent to make the specified payments. The agreement also included a dispute-resolution provision. Article IX established a procedure, culminating in arbitration, to decide questions about the contract's interpretation and application. Respondent moved to compel such arbitration and the court, on October 22, 2012, granted this motion.

On January 7, 2014, the Union and Respondent participated in a hearing conducted by Arbitrator William P. Hobgood. The arbitrator issued a decision on April 9, 2014.

The parties in the present case disagree concerning the arbitrator's holding. The General Counsel and the Union argue that, at least implicitly, the arbitrator held that Respondent continued to be bound by the collective-bargaining agreement. Respondent counters that the arbitrator did not address the issue.

Resolving this question requires a close examination of the arbitral award. In that decision, Arbitrator Hobgood defined the issue as follows:

> ISSUE
>
> Did the Employer violate ARTICLE XVII FRINGE BENEFIT FUNDS, ARTICLE XVIII IMPACT[7] and ARTICLE XIX DUES CHECK-OFF of the March 13, 2009 Collective Bargaining Agreement between the Grievant and the Employer? If so, what is the appropriate remedy?

(Capitalization and underlining as in original.)

This framing of the issue does not specifically focus on the existence or nonexistence of a collective-bargaining agreement. However, it is clear that the Union, at least, presented this issue to the arbitrator. Thus, in describing the positions taken by the parties, the arbitrator's decision states:

> The Union also contends, contrary to the Company's assertion to the contrary, that the CBA is still in effect because it has never been properly terminated by the Company. The Union points to Article XXII which requires that written notice of termination must be given by certified or registered mail at least four (4) months prior to the expiration date. If notice is not given, argues the Union, the contract rolls over for another year. The Company was given notice that the CBA remains in full force and effect.

However, the arbitrator's decision does not indicate that Respondent made the opposite argument, namely, that it had given sufficient notice and therefore the contract had not renewed automatically. Rather, it appears that, during the arbitration, Respondent argued that the contract had not been valid at *any* time, not even when first signed. Thus, the arbitrator's summary of Respondent's arguments includes the following:

> The second argument advanced by the Company asserts the CBA [collective-bargaining agreement] executed by Chad Jones was procured by fraud, duress and misrepresentation. The Company argues that the Union *misrepresented the terms of the agreement, tried to bribe him, and finally using threats of violence to his person and business before he'd sign the contract*. The Company points to the unavailability of CBA required bylaws at the time Grievant was presented the CBA for his signature. The Company points to the testimony of Ran Brest who stated that the Union *offered him the world* [referring to the day of the CBA signing he felt scared an Chad Jones] *I know they offered him the world, I was there.* Jones testified that on the day of the signing he felt scared and [sic] intimated.

(Italics in original; footnotes omitted.)

The arbitrator summarized other arguments advanced by Respondent but none concerned the automatic renewal provision in the collective-bargaining agreement. Additionally, although the Union raised this issue, the arbitrator's decision did not address it.

Rather, the award focuses on the fact that, in Federal court, Respondent had moved to compel arbitration. Thus the arbitrator's decision states:

> It is uncontested that the Company requested the Federal District Court of Oregon order arbitration in this matter. It is also clear from the record that the Court granted the Company's request. The Company's request for arbitration and participation in this arbitration is an acknowledgement by the Company that this matter is properly before the arbitrator for a decision on its merits under the CBA [collective-bargaining agreement].

Similarly, at another point the decision states:

> The Company's request of the court to order arbitration, which was granted by the court, is essentially a validation of the CBA. This validation is further reinforced by the Company's initial adherence to its provisions.

Thus, the arbitrator treated the matter as an "either/or" issue: Either the collective-bargaining agreement was valid or it was not. The arbitrator then concluded that Respondent conceded the validity of the agreement by invoking its arbitration provision.

However, the issue before me concerns the duration of the agreement rather than its validity. The Union filed the lawsuit in 2011, during the original term of the collective-bargaining agreement, which did not expire until February 10, 2012. Even if Respondent's motion to compel arbitration conceded that this contract was valid and binding, it did not concede that the contract had renewed itself automatically.

The court granted Respondent's motion to compel arbitration on October 22, 2012, which was after the original expiration date of the collective-bargaining agreement. Conceivably, therefore, the arbitrator might have some arguable basis to con-

[7] Art. XVIII of the collective-bargaining agreement required Respondent to the Ironworker Management Progressive Action Cooperative Trust, a nonprofit fund for "improvement and development of the Ironworker Industry."

clude that Respondent waived the right to contest that the contract had extended itself automatically, for 1 year, on February 10, 2012. Logically, though, Respondent's motion to compel arbitration neither admitted nor could be deemed to admit that the agreement *again* automatically extended itself a year later, on February 10, 2013. Similarly, Respondent's resort to arbitration would not concede that the collective-bargaining agreement had extended itself once more on February 10, 2014.

Any conclusion about how much Respondent owed to the trust funds would rest, in part, on a conclusion about the duration of the contract. The agreement required Respondent to make certain payments each month, so the total amount owed would depend on how long the contract remained in effect. Therefore, if the arbitrator made a determination concerning how much Respondent must pay, he necessarily would have made a decision about whether the contract had extended itself automatically.

The arbitrator defined the issue to include "what is the remedy?" Nonetheless, he did not order Respondent to make any payments to the trust funds. Rather, the arbitral award stated: "Grievance sustained. Company is directed to submit to an audit to determine all dues and assessments owed from the period August 2009 to the present."

Arguably, this language might be interpreted in two different ways. On the one hand, ordering an audit from August 2009 to the present might imply that the arbitrator decided that the contract was in effect during this entire period. On the other hand, the arbitrator made no finding that Respondent owed payments for any specific month or number of months. In the absence of such a finding, the issue of liability remains open and awaits the information which the audit would produce.[8] It is true that the arbitrator ordered an audit for the period August 2009 "to the present" but ordering an audit is not the same as making a specific finding that the collective-bargaining agreement bound Respondent for that entire period. In sum, I reject the issue preclusion argument (whether called collateral estoppel or otherwise). Instead, I conclude that neither the arbitrator's award nor the District Court's confirmation of it forecloses the Board from deciding issues related to the validity and duration of the collective-bargaining agreement.

Based on the arbitrator's entire decision, I cannot conclude that he considered the issue of whether the contract automatically extended itself. Although the Union raised the issue and, presumably, argued that such an extension occurred, the arbitrator did not discuss the matter or express any conclusion about the merits of the Union's argument. Thus, the arbitrator did not make any ruling on this issue which would guide or bind in the present case.[9]

Therefore, I must interpret the language in the collective-bargaining agreement to the limited extent necessary to resolve the unfair labor practice issue. Article XXII of that agreement provides for the automatic, one-year extension of the contract on February 10, 2012, and every successive February 10 thereafter "unless written notice is given by either party to the other by certified or registered mail at least four (4) months prior to such date of a desire for change or termination. . ."[10]

The record does not establish that Respondent ever gave a notice to terminate the agreement by registered or certified mail, as required. By its terms, the contract would have extended itself in 2012, 2013, 2014, and 2015 and therefore would have been in effect on March 23, 2015, when the Union made the information request. However, before reaching such a conclusion, I will consider Respondent's argument that it repudiated the agreement.

The Repudiation Defense

Respondent asserts that it repudiated the collective-bargaining agreement at some point more than 6 months before the filing of the first unfair charge in this matter. It argues that this repudiation may have occurred as early as February 2010 but, in any event, no later than October 2011.

The Charging Party's brief counters that the repudiation defense is unavailable:

> The collective bargaining agreement between the parties is a construction industry 8(f) agreement which is currently in effect. A party may not lawfully repudiate an 8(f) agreement during the life of the agreement. See, e.g., *Adobe Walls, Inc.*, 305 NLRB 25, 27 (1991) ("[A]n employer . . . may not lawfully repudiate an 8(f) contract during its term"); *Neosho*

[8] I reject the argument, in the Charging Party's brief, that "the arbitration award conclusively found that the collective bargaining agreement is still in effect." The arbitrator held that Respondent's motion to compel arbitration signified that the matter "is properly before the arbitrator for a decision on its merits." The arbitrator also called the motion to compel arbitration a "validation" of the collective-bargaining agreement.

However, the arbitrator's use of the term "validation" must be understood in context. From Federal Magistrate Judge John V. Acosta's review of the arbitrator's decision it becomes clear that Respondent vigorously advanced the argument that the Union's claim should be rejected because it had failed to comply with the earlier, prearbitration steps of the grievance procedure. The arbitrator held, in effect, that Respondent had waived this procedural argument by moving to compel arbitration.

The arbitrator's finding that the matter was "properly before the arbitrator for a decision on the merits" and that Respondent's motion to compel arbitration effected a "validation" addresses Respondent's procedure objection but does not, in my view, constitute a finding that the agreement remained in effect. Moreover, this finding does not constitute a conclusion that the contract was *still* in effect. At most, it signified that the agreement had been in effect at some time.

[9] Even should I assume, for the sake of analysis, that the arbitrator had decided that the contract had extended itself until February 10, 2015, it would fall short of resolving the 8(a)(5) issue here. The complaint alleges a violation beginning on March 23, 2015. Respondent's refusal to furnish the information requested on that date would not violate the Act unless the collective-bargaining agreement remained in effect on that date. The contract would have had to extend itself again on February 10, 2015, which was well after the arbitrator issued his decision.

[10] The second sentence of art. XXII, sec. 1 also addresses contract termination but omits the requirement that such written notice be made by registered or certified mail. However, reading that sentence together with the next sentence, which refers to "such notice as provided for in this Section," leads me to conclude that the contracting parties intended the registered or certified mail requirement to apply to all notices of termination.

> *Const. Co., Inc.*, 305 NLRB 100, 101 (1991) ([A]n employer may only repudiate an 8(f) relationship on the expiration of the existing collective-bargaining agreement.").

The Charging Party, citing case authority that a party may not lawfully repudiate an 8(f) agreement during its term, argues that because of the automatic renewal provisions in the collective-bargaining agreement, it never expired. Because it never expired, it never lawfully could be repudiated. Therefore, the Charging Party asserts, the repudiation defense is not available.

However, stating that the contract never *lawfully* could be repudiated still leaves open the possibility that it might *unlawfully* be repudiated. An action can be unlawful yet still have an effect.

When an employer or union commits an unfair labor practice and someone files a charge within 6 months, the Board can order the offending party to undo the damage and post a notice informing employees that it won't happen again. In the case of an employer unlawfully repudiating a collective-bargaining agreement, resulting in withdrawal of recognition from a union, the remedy would include a requirement that the employer recognize the union and restore the agreement.

However, in general (and with some nuances and exceptions), if someone waits more than 6 months before filing the charge, a statute of limitations precludes the Board from prosecuting, resulting in the unfair labor practice going unremedied, the same as if a charge had not been filed at all.

This statute of limitations appears in Section 10(b) of the Act[11] and Respondent has raised it as an affirmative defense. In its brief, Respondent argues that it repudiated the agreement more than 6 months before April 7, 2015, the date of the first unfair labor practice charge:

> GCR [Gulf Coast Rebar] affected a complete repudiation of the Agreement and its relationship with the union no later than December 2010. Under well-established Board case law, when a union has clear and unequivocal notice that an employer has repudiated its Agreement, the Union is required to file an Unfair Labor Practice Charge within the 10(b) period following such notice.

The Respondent further argues, in effect, that because the Union did not file an unfair labor practice charge within 6 months of the repudiation, and cannot now challenge the lawfulness of that action, it also is too late to challenge the result of that action, namely, the absence of a collective-bargaining relationship. Respondent's brief further states:

> The Board has held that when a union receives clear and unequivocal notice of repudiation of a collective bargaining agreement that the union must file an unfair labor practice within the 10(b) period. 29 U.S.C. § 160(b); *A & L Underground*, 302 NLRB 467, 470 (1991). The holding in *A & L Underground* further indicates that absent a filing within the 10(b) period an employer is free to change terms and conditions of employment even including recognition of a different union if it so chooses. *A & L Underground*, 302 NLRB at 468.

The Government disputes that Respondent's actions amounted to the clear repudiation required by *A & L Underground*. The General Counsel's brief states:

> Respondent argues that it repudiated the 8(f) contract and that it is now too late to challenge that repudiation. Respondent's main citation in support of this proposition is *A & L Underground*, 302 NLRB 467 (1991). In *A & L Underground*, the union was aware of the employer's belief that the collective bargaining agreement was for a single project, rather than a term of years, and that the employer had ceased complying with the terms about two years before it filed a charge alleging repudiation, without its taking any action to enforce or police the contract in the intervening time. The Board did note the distinction between material breaches, such as failing to make trust fund payments, and total repudiation, which requires "a clear and unequivocal intention to repudiate" the contract, and held that only the latter is to be used to date the beginning of the 10(b) period. 302 NLRB at 469, citing *Farmingdale Iron Works*, 249 NLRB 98, 98 (1980).

The General Counsel argues that Respondent's conduct, which included a failure to make trust fund payments, only amounts to a material breach of the contract and not total repudiation.[12] Although this argument has some theoretical appeal, I do not believe it consistent with Board precedent. Rather. I conclude that an 8(f) agreement can be repudiated during its term, albeit unlawfully. The Board has authority to order a remedy for such a violation if a charge has been filed within the 6-month period prescribed in Section 10(b) of the Act. The Government discounts the significance of the October 18, 2011

[11] Sec. 10(b) of the Act provides, in part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge." 29 U.S.C. § 160(b).

[12] The *A & L Underground* case also is inapposite, the Government asserts, because the Union in the present case made much more diligent efforts, even filing lawsuits, to enforce the collective-bargaining agreement. However, I believe the *A & L Underground* decision does not turn on a union's general vigor but rather on whether it filed a charge within the 6-month period. Thus, in *A & L Underground*, the Board stated: "We find that the policies underlying Section 10(b) are best effectuated by requiring a party, in order to avoid the time-bar, to file an unfair labor practice charge within 6 months of its receipt of clear and unequivocal notice of total contract repudiation." 302 NLRB at 468.

However, the Union's diligence would be relevant to the following argument: It is not merely unlawful to repudiate an 8(f) agreement during its term but impossible. The agreement is indestructible and only ends when it expires or when it is abandoned. The Union's persistent efforts to enforce the agreement demonstrate that the Union had not abandoned it.

Although this argument has some theoretical appeal, I do not believe it is consistent with Board precedent. Rather. I conclude that an 8(f) agreement can be repudiated during its term, albeit unlawfully. The Board has authority to order a remedy for such a violation if a charge has been filed within the 6-month period prescribed in Sec. 10(b) of the Act.

letter from Respondent's attorney, Morgado, which stated, "We deny the legality of this contract and believe it to be void. . .to the extent a court deems it not to be void we immediately terminate it." The General Counsel's brief states:

> [N]o subsequent letters were sent that clearly and unequivocally asserted repudiation. None of Respondent's three Answers to the complaint alleged repudiation as an affirmative defense. [GCX 1(dd), 1(ii), and 1(jj)]. The Union's first clear and unequivocal notice that Respondent was contending that it had repudiated the contract by its refusal to fulfill its obligations under the contract may not have occurred until Respondent's opening argument at the hearing on December 15, 2015.

Contrary to the General Counsel, I conclude that the Union had ample notice that Respondent was repudiating the contract. This notice began with the October 18, 2011 letter sent to the Union by Respondent's attorney, Dale Morgado. Credible evidence does not establish that the Union received earlier notice, but receipt of Morgado's October 18, 2011 letter is not in dispute.

Based upon my observations of the witnesses, I believe the testimony of the Regional District Council's president, Stephen Parker, is reliable and credit it. That testimony establishes that the Union received Morgado's letter sometime around October 18, 2011. The Union's attorney replied to it of February 10, 2012.

Morgado's letter stated that several months earlier, his client sent a letter terminating the contract. Whether or not the Union received such a letter, Morgado's reference to it makes clear that Respondent intended to terminate the contract.

As discussed above, Morgado's October 18, 2011 letter stated, "We deny the legality of the contract and believe it to be void, nevertheless, this letter is to affirm that which my client has already done and to the extent a court deems it not to be void we immediately terminate it." That language is clear and unequivocal.

It is true that this letter spoke of terminating the contract and did not use the word "repudiate."[13] However, the letter should not be considered in isolation but together with circumstances which shed light on its import. These circumstances indicate that Respondent had a consistent intent, over a long period, to sever completely its relationship with the Union. That is, they showed that Respondent was not simply an "on-again-off-again" employer that sometimes wanted a relationship with the Union and sometimes did not.

In not a few instances, an employer's failure to make benefit fund payments can be attributed to financial problems or other difficulties and does not indicate an intention to abandon the employer's relationship with the union. The spirit is willing, so to speak, but the cash is weak. However, in Respondent's case, the spirit was unwilling, and consistently so.

The illuminating facts involve more than a mere arrearage in benefit fund payments. Respondent's conduct indicated that it wanted nothing at all to do with the Union. Thus, Regional District Council President Parker testified as follows on cross-examination:

> Q. Did Gulf Coast as an entity approach the Union to use JATC members?
> A. I trained Chad OSHA 30, Chad Jones through the JATC apprenticeship program.
>
> Q. If you can just answer my question. I'll rephrase more clear. Since December 2010, has Gulf Coast approached the Union to use the JATC or any other training resources?
> A. No.
>
> Q. Since December 2010, has Gulf Coast used any hiring hall provisions of the contract?
> A. No.

This shunning of the Union, together with Morgado's terminate-the-contract language, sent a signal of repudiation when the Union received Respondent's attorney's October 18, 2011 letter. The considerable length of time during which Respondent had made no payments at all to the trust funds, together with the fact that Respondent did not use the Union's apprenticeship program or hiring hall, made the message in Morgado's October 18, 2011 letter unmistakable. Therefore, I conclude that when the Union received the letter in mid-October 2011, it had clear and unequivocal notice of Respondent's intent to repudiate the collective-bargaining agreement, and at this point the 6-month 10(b) period started to run. *Park Inn Home for Adults*, 293 NLRB 1082 (1989).

However, even if the Union received less than the necessary clear and unequivocal notice of repudiation in mid-October 2011, the position taken by Respondent at the January 7, 2014 arbitration hearing removed any doubt. At that hearing, as the arbitrator's decision reported, the Respondent asserted that the collective-bargaining agreement signed by Jones "was procured by fraud, duress and misrepresentation. The Company argues that the Union *misrepresented the terms of the agreement, tried to bribe him, and finally us[ed] threats of violence to his person and business before he'd sign the contract*. . .Jones testified that on the day of the signing he felt scared and intimated." (Italics in original.) The word "intimated" appears to be a typographical error and I infer from context that the arbitrator meant "intimidated."

Thus, in addition to the earlier indications of repudiation, including Respondent's October 18, 2011 letter purporting to terminate the agreement, the Union now heard Respondent tell the arbitrator that the Union had resorted to fraud, duress, misrepresentation, and threats of violence to secure Jones' signature on the agreement. Moreover, the Union heard Jones testify that he felt scared when he signed it. Obviously, a contract procured by such criminal conduct would be void from the start.

Such strong accusations convey more than an intent to terminate the collective-bargaining agreement. They reflect a desire to disclaim and repudiate the bargaining relationship from its very beginning. Respondent's statements at the Janu-

[13] Likewise, the union attorney's February 10, 2012 reply did not speak of repudiation. Rather, it stated that Respondent had not complied with the contractual requirements for terminating the agreement and therefore it remained in effect.

ary 7, 2014 hearing, considered together with the October 18, 2011 letter from Respondent's attorney, Respondent's failure to abide by the contract's terms and its failure to use the Union's apprenticeship program and hiring hall, communicate a clear and unequivocal repudiation of the contract and of the bargaining relationship. I conclude that no further statement was necessary to place the Union on clear and unequivocal notice of the repudiation.[14]

Accordingly, even if the 10(b) period did not begin to run in mid-October 2011, when the Union received Respondent's lawyer's letter, it certainly did begin on January 7, 2014, which still was more than 6 months before the filing of the first charge in this proceeding. In reaching this conclusion, I necessarily reject the conclusions which the General Counsel would draw from the arbitration.

After the Union filed its lawsuit against Respondent in the United States District Court in Oregon, Respondent moved to compel arbitration. The General Counsel argues that this motion vitiated any effects of the October 18 termination letter because the motion manifested a belief by Respondent that the collective-bargaining agreement remained in effect. The General Counsel's brief states:

> Even if Morgado's October 18, 2011 letter (GCX 3) could somehow be considered notice of Respondent's intent to repudiate the contract, Respondent's motion to compel arbitration occurred sometime in the next year and after the contract renewed for the first time, and shows that Respondent considered the terms of the contract to be in effect. Respondent's action of seeking to compel arbitration pursuant to the terms of the contract conclusively establishes that any earlier attempt to repudiate was ineffective, and that Respondent knew it.

However, for reasons discussed above, I do not conclude that Respondent's motion to compel arbitration signified either that it believed the collective-bargaining agreement was still in effect or that the motion had the legal effect of reviving that contract. Additionally, I conclude that Arbitrator Hobgood's statement about the motion being a "validation" of the contract was a narrow holding in response to Respondent's argument that the Union was not entitled to relief because it had failed to take the initial, prearbitration steps specified in the agreement's grievance procedure. See footnote 8, above. Arbitrator Hobgood rejected that argument but his language was inartful. Magistrate Judge Acosta's review of the decision criticized the less-than-thorough discussion:

> The question of whether Gulf Coast's seeking referral of this action to arbitration waived its right to object to the Union's failure to comply with the grievance procedure in the Agreement is a question of procedural arbitrability to be decided by the arbitrator. The record reveals the parties argued this issue before, during, and after the hearing, placing the issue clearly before Hobgood. Despite the emphasis placed by the parties on this issue, and the importance of the issue to the resolution of the parties' claims, Hobgood barely addressed the issue in Award, obliquely referencing the three-step grievance procedure in the Agreement and stating his conclusion in the most general terms. The court does not agree with Hobgood's conclusion nor does it condone the cursory manner in which he addressed the issue, nonetheless, the court must afford Hobgood's decision on procedural arbitrability the extreme deference required by governing precedent. That said, the Award does address the issue and is consistent with existing law which requires an arbitrator to consider allegations of waiver, delay, or similar defenses to arbitration. Consequently, the Award was not made in manifest disregard of the law.

In these circumstances, I conclude that the arbitrator's reference to "validation" does not amount to a finding that the agreement was in effect at the time of the arbitration hearing. An arbitration to determine liability under a contract does not have to take place during the term of that agreement because the agreement's expiration does not necessarily extinguish claims which arose during its term.

Moreover, it concerns me that the principle advocated by the General Counsel could restrict a party's ability to defend against a contractual claim by citing another provision in the same agreement. In fairness, a party should be able to say "the contract you cite is not valid, but even if it were valid, here is why it would not create the liability you claim."

The General Counsel's argument, however, implicates more than fairness. Federal policy strongly favors arbitration. To require a party to waive a defense as a condition of arbitration would discourage rather than encourage use of this forum. Increasing the price of arbitration in this manner would impede the Federal policy in its favor.

For all these reasons, I reject the General Counsel's argument. Instead, I conclude that Respondent's motion to compel arbitration neither conceded that the collective-bargaining agreement remained in effect nor waived its right to contest the validity of that agreement.

In sum, I conclude that Respondent placed the Union on clear and unequivocal notice that it was repudiating the collective-bargaining agreement, that the Union received this notice in mid-October 2011 but in any event by January 7, 2014. It then had 6 months in which to file an unfair labor practice charge. *A & L Underground*, 302 NLRB 467 (1991), citing *Desks, Inc.*, 295 NLRB 1 (1989); *Teamsters Local 43 v. NLRB*, 825 F.2d 608, 616 (1st Cir. 1987); *AMCAR Div., ACF Industries*, 234 NLRB 1063 (1978), enfd. as modified 596 F.2d 1334, 1351-1352 (8th Cir. 1979).

Because the Union did not file an unfair labor practice charge within the 6-month period specified by Section 10(b), it

[14] In sum, I conclude that Respondent did not have to use the specific word "repudiate" because, in light of its previous conduct, accusing the Union of misrepresentation, duress, bribery, and threats of violence communicated that message clearly and unequivocally. My reasoning may be illustrated by this thought experiment: Suppose that I asked someone "do we have a deal?" In this hypothetical he replies, "You, sir, are a lowdown thieving skunk so shameless you'd steal your grandma's pet duck!" After those words, would it really be necessary to seek a clarification by saying, "Yes, but do we have a deal?" Respondent's accusations were similarly extreme and reasonably would be understood, in context and without further clarification, to repudiate any bargaining relationship.

cannot challenge the lawfulness of the repudiation. Because of this repudiation, the Union was not the exclusive bargaining representative of any of Respondent's employees when it made the information request on March 23, 2015. Therefore, Respondent did not violate Section 8(a)(5) by refusing the furnish the Union with the requested information.

Examining the facts from the standpoint of remedy leads to a similar conclusion: Respondent's refusal to furnish the information requested on March 23, 2015, did not constitute a remediable violation of the Act.

Section 8(a)(5) of the Act makes unlawful an employer's refusal to bargain in good faith but not all violations involve an outright withdrawal of recognition. An employer can commit several types of 8(a)(5) violations while still recognizing a union as its employees' exclusive representative. For example, it can violate Section 8(a)(5) by refusing to provide requested relevant information, by unilaterally changing working conditions without notifying and bargaining with the union, or by skipping the union and dealing directly with its employees. So long as the employer continues to recognize the union, each such violation can be remedied by ordering the employer to stop to undo the damage and to post a notice.

However, the 8(a)(5) violation alleged in this case cannot be remedied in this manner. It resulted from a massive earlier violation of Section 8(a)(5), the withdrawal of recognition, which lies untouchable in the pre-10(b) past. If the Union had filed a charge within 6 months of the contract's repudiation, the Board could have ordered Respondent to undo the unlawful withdrawal of recognition and to bargain with the Union. However, the Union did not file such a charge and the 10(b) "statute of limitations" precludes the Board from ordering that remedy now. In the absence of an order to recognize and bargain with the Union, an order to furnish information would do no good.

The Union requested the information to better perform its representation function. Ordering Respondent to furnish the information would result in a meaningless act if the Union has no representation function to perform.

In other words, to remedy the refusal to furnish information, Respondent also must remedy the earlier withdrawal of recognition. Yet, Section 10(b) precludes the Board from ordering Respondent to undo that earlier violation.

For all the reasons discussed above, I recommend that the Board dismiss the 8(a)(5) allegations.

REMEDY

Respondent, having violated Section 8(a)(1) and (3) of the Act, must take all actions necessary to fully remedy those unfair labor practices. These actions include posting the notice to employees attached to this decision as "Appendix A" at the locations described below. At each such location, Respondent must post both English and Spanish versions of the notice.

Respondent, as a contractor in the construction industry, establishes jobsites at various locations and later closes those jobsites when the work is completed. Because of frequent changes in the number of employees at the location of their work, to assure that all employees have the opportunity to read the notice, Respondent must post English and Spanish versions of the notice at every jobsite within the United States and its territories where Respondent's employees perform work during any portion of the notice posting period.

If any jobsite does not have an appropriate place for posting notices, Respondent must mail copies of the notice to all employees working at such jobsite.

Additionally, Respondent must post the notice, in English and Spanish, at its office and place of business in Jacksonville, Florida.

Respondent also must offer employee Colby Lee immediate and full reinstatement to his former position or to substantially equivalent employment if his former position is not available, and make him whole, with interest, for all losses he suffered because of Respondent's unlawful discrimination against him.

CONCLUSIONS OF LAW

1. Respondent, Gulf Coast Rebar, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent is an employer primarily engaged in the building and construction industry within the meaning of Section 8(f) of the Act.

3. The Charging Party, the Iron Workers Regional District Council, International Union of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL-CIO, and Locals 846 and 847, International Union of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL-CIO (collectively, the Union), are labor organizations within the meaning of Section 2(5) of the Act.

4. Respondent violated Section 8(a)(1) of the Act by the following conduct: Threatening employees with closer than normal supervision and discharge because of their membership in and activities on behalf of the Union; telling employees that Respondent did not recognize the Union and that they could not inform other employees of the identity of the Union steward; telling employees that they should not report grievances about their working conditions to the Union; threatening to engage in a physical altercation with employees and threatening employees with discharge because of their membership in and activities on behalf of the Union; physically assaulting employees because of their membership in and activities on behalf of the Union; falsely reporting to police that employees had committed a physical assault because of the employees' membership in and activities on behalf of the Union; threatening employees with discharge unless they removed union stickers from their hardhats; removing union stickers from employees' hardhats; telling employees that Respondent would not recognize the Union; creating an impression among its employees that their union activities were under surveillance; and threatening employees with discharge and unspecified reprisals if they engaged in union activities.

5. Respondent violated Section 8(a)(1) and (3) of the Act by the following conduct: Discharging employee Colby Lee; after reinstating Colby Lee, isolating him from other employees; by these actions and certain of the 8(a)(1) violations described in paragraph 5, above, causing the termination of employment of Colby Lee.

6. Respondent did not violate the Act in any other manner

alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[15]

ORDER

The Respondent, Gulf Coast Rebar, Inc., Jacksonville, Florida, and at every jobsite at which its employees perform work, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with closer than normal supervision and discharge because of their membership in and activities on behalf of the Union; telling employees that Respondent did not recognize the Union and that they could not inform other employees of the identity of the union steward; telling employees that they should not report grievances about their working conditions to the Union; threatening to engage in a physical altercation with employees and threatening employees with discharge because of their membership in and activities on behalf of the Union; physically assaulting employees because of their membership in and activities on behalf of the Union; falsely reporting to police that employees had committed a physical assault because of the employees' membership in and activities on behalf of the Union; threatening employees with discharge unless they removed union stickers from their hardhats; removing union stickers from employees' hardhats; telling employees that Respondent would not recognize the Union; creating an impression among its employees that their union activities were under surveillance; and threatening employees with discharge and unspecified reprisals if they engaged in union activities.

(b) Isolating any employee from other employees because of that employee's membership in or activities on behalf of a labor organization or other protected, concerted activity or to discourage other employees from engaging in such activity.

(c) Discharging or causing the termination of employment of any employee because of that employee's membership in or activities on behalf of a labor organization or other protected, concerted activity or to discourage other employees from engaging in such activity.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to REFRAIN FROM ANY AND ALL SUCH ACTIVITIES.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Colby Lee immediate and full reinstatement to his former position or to a substantially equivalent position if his former position no longer is available.

(b) Make Colby Lee whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Colby Lee and, within 3 days thereafter, notify in writing that this has been done and that the discharge will not be used against him in any way.

(d) Within 14 days after service by the Region, post at its facilities in Jacksonville, Florida, and at every jobsite at which its employees perform work, at any time during the posting period described below, copies of the attached notice marked "Appendix A."[16] If there is no appropriate place at a jobsite for posting the notice, the Respondent shall mail a copy, at its expense, to each employee working at that jobsite. Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 13, 2015. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C., March 4, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

protection

Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the Act.

WE WILL NOT threaten employees with closer than normal supervision or discharge because of their membership in and activities on behalf of the Union.

WE WILL NOT tell employees that we did not recognize the Union and that they could not inform other employees of the identity of the union steward.

WE WILL NOT tell employees that they should not report grievances about their working conditions to the Union.

WE WILL NOT threaten to engage in a physical altercation with employees or threaten employees with discharge because of their membership in and activities on behalf of the Union.

WE WILL NOT physically assault employees because of their membership in and activities on behalf of the Union.

WE WILL NOT falsely report to police that employees had committed a physical assault because of the employees' membership in and activities on behalf of the Union.

WE WILL NOT threaten employees with discharge unless they removed union stickers from their hardhats.

WE WILL NOT remove union stickers from employees' hardhats.

WE WILL NOT tell employees that Respondent would not recognize the Union.

WE WILL NOT create an impression among employees that their union activities are under surveillance.

WE WILL NOT threaten employees with discharge or unspecified reprisals if they engaged in union activities.

WE WILL NOT isolate any employee from other employees because of that employee's membership in or activities on behalf of a labor organization or other protected, concerted activity or to discourage other employees from engaging in such activity.

WE WILL NOT discharge or cause the termination of employment of any employee because of that employee's membership in or activities on behalf of a labor organization or other protected, concerted activity or to discourage other employees from engaging in such activity.

WE WILL NOT**,** in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reinstate employee Colby Lee to his former position or to a substantially equivalent position if his former position is not available.

WE WILL make employee Colby Lee whole, with interest, for all losses he suffered because of our unlawful discrimination against him.

GULF COAST REBAR, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-149627 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.